Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

STATE OF LOUISIANA,
DEPARTMENT OF NATURAL RESOURCES

Petitioner

VERSUS

ALBERT J. AVENAL, JR., CLARENCE R. DUPLESSIS, KENNETH A. FOX, FOX OYSTER COMPANY, AND NICK L. SKANSI

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA
and
LOUISIANA COURT OF APPEAL FOR THE FOURTH CIRCUIT

APPENDIX VOLUME II
Appendix I - Appendix M

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95pp

APPENDIX I

U.S.C.A. Const. Art. VI cl. 2

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX J

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

ALBERT J. AVENAL, JR., ANTHONY BARTHELEMY, CHRIS. P. BARTHELEMY, GARY BARTHELEMY, NEAL BESHEL, ANNA BUTSCHER BURAS, ANNA BESSIE BODDEN BURAS, NEAL BURAS, RALPH BURAS, RALPH J. BURAS, JR., RICHARD BURAS, DONALD J. CAMPO, DONALD J. CAMPO, JR., DONALD P. CAMPO, ERNEST CAMPO, MATHILDA GUERRA CAMPO, ESTATE OF TONY CAMPO, ANNA CIBILICH, PERO CIBILIC, RICHARD H. CLARK, CLEAR WATER OYSTERS, CRESCENT OYSTERS, INC., IRVIN CROSS, ESTATE OF JOSEPH CROSS, MELVIN CROSS, CLARENCE R. DUPLESSIS, CLARENCE R. DUPLESSIS, JR. ARTHUR ENCALADE, CARLISS J. ENCALADE, ESTATE OF JOSEPH ENCALADE, STANLEY ENCALADE, ENCADE SEAFOOD, INC., M.J. FARAC, JR., MAJA FARAC, SINAJKA FARAC, DANIEL R. FERNANDEZ, ANN P. FOX, CALVIN R. FOX, CALVIN R. FOX, DALE E. FOX, KENNETH A. FOX, KENNETH RYAN FOX, MARIE 0. FOX, RACHEL FOX, RHONDA FOX, RODNEY FOX, JR., RODNEY L. FOX, ROSS LOUIS FOX, FOX INDUSTRIES, FOX OYSTER CO., INC., FOX SEAFOODS, INC., ESTATE OF M.J. FRANICEVICH, ESTATE OF

FRANK GANIER, GULF INC., *
MICHAEL GUTTUSO, ABRAHAM *
HARNESS, MORRIS HARVEY, *
NATHAN G. HARVEY, HOWARD HINGLE, *
LAURIE A. DUPLESSIS HOLIDAY, *
HERMAN ISADORE, JR., J & P *
OYSTERS, INC., ESTATE OF MAYO P. *
JONES, JR., ROBERT N. KEENAN, *
DONALD J. KENNAIR, JR., RALPH *
KIEFF, RALPH J. KIEFF, JR., *
JOSEPH LABRUZZO, ARTHUR L. *
LAFRANCE, JOEY G. LATAPIE, *
CLIFFORD LEBOUEF, JEAN LEBOUEF, *
LINDY LEBOUEF, LORNE LEBOUEF, *
ANTE LEPETICH, NATO LEPETICH, *
JOHN MARTINEZ, MEDERIC R. MEYER, *
MATTHEW DAVID MEYERS, MITCHEL *
MEYERS, ALLAN C. MOLERO, JR., *
JANET MOLERO, JR., ELENORA NOOK, *
CLADMON NARCISSE, FELIX NARCISSE, *
OLIVER B. NARCISSE, NICOLAE *
NITICA, OYSTER FISHERIES, INC., *
CURT PANNAGL, PATTI PANNAGL, *
RICHARD PATTERSON, PEAN, INC., *
JOSIP PIACUN, MARINKO PIACUN, *
PASKO PIACUN, ANTON N. POPICH, *
ARTHUR A. REDDICK, JR., ARTHUR A. *
REDDICK, KEVIN JOSEPH REDDICK, *
JOHN DWIGHT RILEY, VAN ROBIN, *
ADAM SERIGNE, LIONEL R. SERIGNE, *
O'NIEL N. SERIGNE, PHILLIP H. *
SIMMONS, HELEN T. SKANSI, NICK L. *
SKANSI, FRANK SLAVICH, JR., TACO, *
INC., ANN S. TESVICH, FRANCES LYNN *
TESVICH, IVO A. TESVICH, JOHN A. *

TESVICH, KUZMA *
TESVICH, LISA K. TESVICH, MARIA *
TESVICH, NEDO TESVICH, *
PETER J. TESVICH, PETER L. TESVICH, *
TESVICH OYSTERS, INC., CHARLIE *
THOMPSON, STEVE THOMPSON, JOSEPH *
TINSON, TINSON SEAFOOD COMPANY, *
NIKOLA ANTE VEKIC AND *
NIKOLA ZARAK *
*
Plaintiffs *
*
VERSUS *
*
UNITED STATES OF AMERICA, *
*
Defendant
****

COMPLAINT – CLASS ACTION
No. 94-261 L
Filed Apr 26, 1994

COMPLAINT

NOW INTO COURT, through undersigned counsel, come plaintiffs, ALBERT J. AVENAL, JR., ANTHONY BARTHELEMY, CHRIS P. BARTHELEMY, GARY BARTHELEMY, NEAL BESHEL, ANNA BUTSCHER BURAS, ANNA BESSIE BODDEN BURAS, NEAL BURAS, RALPH J. BURAS, RALPH J. BURAS, JR., RICHARD BURAS, DONALD J. CAMPO, DONALD J. CAMPO, JR., DONALD P. CAMPO, ERNEST CAMPO, MATHILDA GUERRA CAMPO, ESTATE OF TONY CAMPO, ANNA CIBILICH, PERO CIBILIC, RICHARD H. CLARK, CLEAR WATER OYSTERS, INC.,

CRESCENT OYSTERS, INC., IRVIN CROSS, ESTATE OF JOSEPH CROSS, MELVIN CROSS, CLARENCE R. DUPLESSIS, CLARENCE R. DUPLESSIS, JR., ARTHUR ENCALADE, CARLISS J. ENCALADE, ESTATE OF JOSPEH ENCALADE, STANLEY ENCALADE, ENCALADE SEAFOOD, INC., M.J. FARAC, M.J. FARAC, JR., MAJA FARAC, SINAJKA FARAC, DANIEL R. FERNANDEZ, ANN P. FOX, CALVIN R. FOX, CALVIN R. FOX, JR., DALE E. FOX, GENE L. FOX, JUSTIN RYAN FOX, KENNETH A. FOX, KENNETH RYAN FOX, MARIE 0. FOX, RACHEL FOX, RHONDA FOX, RODNEY FOX, JR., RODNEY L. FOX, ROSS LOUIS FOX, FOX INDUSTRIES, FOX OYSTER CO., INC., FOX SEAFOODS, INC., ESTATE OF M.J. FRANICEVICH, ESTATE OF FRANK GANIER, GULF QUALITY, INC., MICHAEL GUTTUSO, ABRAHAM J. HARNESS, MORRIS HARVEY, NATHAN G. HARVEY, HOWARD HINGLE, LAURIE A. DUPLESSIS HOLIDAY, HERMAN ISADORE, JR., J & P OYSTERS, INC., ESTATE OF MAYO P. JONES, JR ROBERT M. KEENAN, DONALD J. KENNAIR, JR., RALPH J.KIEFF, RALPH J. KIEFF, JR., JOSEPH LABRUZZO, ARTHUR L. LAFRANCE, JOEY G. LATAPIE, CLIFFORD LEBOUEF, JEAN LEBOUEF, LINDY LEBOUEF, LORNE LEBOUEF, ANTE LEPETICH, MATO LEPETICH, JOHN MARTINEZ, MEDERIC R. MEYER, MATTHEW DAVID MEYERS, MITCHEL MEYERS, ALLAN C. MOLERO, JR., JANET MOLERO, ELENORA MOOK, CLADMON NARCISSE, FELIX NARCISSE, OLIVER B. NARCISSE, NICOLAE NITICA, OYSTER FIS HERIES, INC., CURT PANNAGL, PATTI PANNAGL, RICHARD PATTERSON, PEAN, INC., JOSIP PIACUN, MARINKO PIACUN, PASKO PIACUN, ANTON N. POPICH, ARTHUR A. REDDICK, JR. , ARTHUR A. REDDICK, KEVIN JOSEPH REDDICK, JOHN DWIGHT

RILEY, VAN ROBIN, ADAM R. SERIGNE, LIONEL R. SERIGNE, O'NIEL N. SERIGNE, PHILLIP H. SIMMONS, HELEN T. SKANSI, NICK L. SKANSI, FRANK SLAVICH, JR., TACO, INC., ANN S. TESVICH, FRANCES LYNN TESVICH, IVO A. TESVICH, JOHN A. TESVICH, KUZMA I. TESVICH, JR., ESTATE OF KUZMA J. TESVICH, LISA K. TESVICH, MARIA TESVICH, NEDO TESVICH, PETER J. TESVICH, PETER L. TESVICH, TESVICH OYSTERS, INC., CHARLIE THOMPSON, STEVE THOMPSON, JOSEPH TINSON, TINSON SEAFOOD COMPANY, NIKOLA ANTE VEKIC AND NIKOLA ZARAK, for themselves and all other members of the class hereinafter described, who allege as follows:

JURISDICTION

1.

This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. 1491, et seq., and the Fifth Amendment of the United States Constitution which prohibits the taking of private property without just compensation.

PLAINTIFFS AND PROPOSED CLASS REPRESENTATIVES

2.

The named plaintiffs and proposed class representatives, and all other members of the class hereinafter described, are residents of the State of Louisiana.

DEFENDANT

3.

Made defendant herein is the United States of

America through its agencies including but not necessarily limited to the United States Army Corps of Engineers.

FACTUAL ALLEGATIONS

4.

In or about the Spring of 1988, defendant, through the United States Army Corps of Engineers, commenced construction of the Caernarvon Freshwater Diversion Project, as authorized on October 27, 1965 , by Public Law 89-298, of the Eighty-ninth Congress, First Session. Construction of the Caernarvon structure was completed in or about the Fall of 1991.

5.

The stated purposes Caernarvon Project not limited to, the enhancement of emergent marsh vegetation growth and the reduction of marsh loss. The United States Army Corps of Engineers attempts to achieve this stated goal by allowing fresh water from the Mississippi River to flow through the Caernarvon structure into the salt water areas.

6.

When the freshwater diverted from the Mississippi reaches the waterbottoms leased by plaintiffs from the State of Louisiana, it dilutes the sa linity of the waters and deposits silt on the waterbottoms. As a direct result of the dilution of the salinity of the waters wherein plaintiffs' leases are located, as well as, the increased vegetation- and bacteria on or near the water bo;ttoms wherein plaintiffs' Leases are located, and the silt deposits, the productivity of plaintiffs' leases

has been and is being destroyed, as the altered conditions of the waters wherein plaintiffs" leases are located make plaintiffs' leases no longer capable of oyster growth and cultivation.

7.

The hereinabove described actions of defendant have resulted in a permanent and substantial interference with plaintiffs' use and enjoyment of their land amounting to a taking of an interest in plaintiffs' valuable property rights without compensation in violation of the Fifth Amendment of the United States Constitution.

8.

Defendant has not instituted any condemnation proceeding to acquire all or any part of plaintiffs' land, nor has defendant paid or offered to pay to plaintiffs any amount for the damages inflicted upon their oyster leases.

THE CLASS

9.

This action is brought and may properly be maintained as a class action pursuant to provisions of Rule 23 of the Rules of the United States Court of Federal claims. Plaintiffs bring this action on behalf of themselves and all others similarly situated as representative members of the following proposed class:

All individuals, partnerships, corporations, etc, owning oyster farming leases in the State of Louisiana which leasehold interests were destroyed or otherwise adversely affected by the actions of the United States

government known as the Caernarvon Freshwater Diversion Project, as more fully explained below.

NUMEROSITY
10.

The proposed class is so numerous that the individual joinder of all of its members is impracticable. The exact number of members of the class is not known, but it estimated that there are not less than ONE THOUSAND (1,000). members.

COMMON QUESTIONS OF LAW AND FACT
11.

There are common questions of law and fact in the action that relate to and affect the rights of each member of the class and the relief sought is common to the entire class, namely, whether the destruction of plaintiffs' oyster leases constitutes a compensable taking within the meaning of the Fifth Amendment of the United States Constitution.

TYPICALITY OF CLAIMS
12.

Plaintiffs' claims are typical of the claims of the members of the class. Plaintiffs and all- members of the class sustained a loss of property arising out of defendant's conduct as explained herein.

FAIR AND ADEQUATE REPRESENTATION
13.

Plaintiffs will fairly and adequately protect the interests of the members of the class. They have retained attorneys

experienced and capable in class action and in litigation of oyster damage claims. There is no conflict between any individual named plaintiff and other members of the class with respect to this action, or with respect to the claims for relief set forth herein.

RISK OF VARYING ADJUDICATIONS
14.

This action is properly maintained as a class action in that the prosecution of separate actions by individual members of the class would create a risk of varying adjudications with respect to individual members of the class which as a. practical matter would be dispositive of the interests of the other members not parties to the adjudications, or would substantially impair or impede their ability to protect their interest.

GOVERNMENT HAS ACTED ON GROUNDS
GENERALLY APPLICABLE TO CLASS
15.

The United States has acted or refused to act, as alleged mor specifically below, on grounds which are generally applicable to the entire class.

SUPERIORITY OF PROCEEDING
AS A CLASS ACTION
16.

A class action is superior to other available methods for the fair and efficient adjudication of this litigation, since individual joinder of all members is impracticable. Even if class members could afford individual litigation, it would be unduly burdensome to the Courts in which the

individual litigation would proceed. Individual litigation in this matter would magnify the delay and expense to all parties in the court system. The class action device presents fewer management difficulties and provides the benefit of unitary adjudication, economy of scale and comprehensive supervision by a single court.

RELIEF SOUGHT
17.

Plaintiffs request a judgment of this court in their favor and against defendant as follows:

a. That in due course this matter be certified as a class action with an "opt-out" designation;

b. For damages as occasioned by the loss in future profits from the sale of oysters from plaintiffs' leases;

C. For damages as occasioned by the loss of past investment in their leasehold interests;

d. For legal interest on all amounts due from the date of the taking until paid;

e. For recovery of plaintiffs' reasonable costs, disbursements, and expenses, including attorneys' fees, damage appraisals, and expert fees actually incurred because of this proceeding, in accordance with 28 U.S.C. 1.491 and 42 U.S.C. 4654; and,

f. For all general and equitable relief

Respectfully submitted,

ST. MARTIN, LIRETTE, SHEA,
WATKINS & MCNABB, APLC

/s/ Michael St. Martin

MICHAEL ST. MARTIN
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Signed this 22nd day of April, 1994

PLEASE SERVE THE UNITED STATES OF AMERICA THROUGH DELIVERY TO THE ATTORNEY GENERAL IN ACCORDANCE WITH RUSCFC 4

APPENDIX K

25TH JUDICIAL DISTRICT COURT FOR
THE PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NO. 38-266 DIVISION B

ALBERT J. AVENAL, JR., ANTHONY BARTHELEMY, CHRIS P. BARTHELEMY, GARY BARTHELEMY, ANNA BUTSCHER BURAS, ANNA BESSIE BODDEN BURAS, NEAL BURAS, RALPH J. BURAS, RALPH J. BURAS JR., RICHARD BURAS, DONALD J. CAMPO JR., DONALD P. CAMPO, ERNEST CAMPO, MATHILDA GUERRA CAMPO, ESTATE OF TONY CAMPO, ANNA CIBILICH, PERO CIBILICH, RICHARD H. CLARK, CRESCENT OYSTER, INC., IRVIN CROSS, ESTATE OF JOSEPH CROSS, MELVIN CROSS, CLARENCE R. DUPLESSIS, CLARENCE R. DUPLESSIS, JR., ARTHUR ENCALADE, CARLISS J. ENCALADE, ESTATE OF JOSEPH ENCALADE, STANLEY ENCALADE, ENCALADE SEAFOOD, INC., M.J. FARAC, M.J. FARAC, JR., MAJA FARAC, SINAJKA FARAC, ANN P. FOX, CALVIN R. FOX, CALVIN R. FOX, JR., DALE. E. FOX, GENE L. FOX, JUSTIN RYAN FOX, KENNETH A. FOX, KENNETH RYAN FOX, MARIE O. FOX, RACHEL FOX, RHONDA FOX, RODNEY FOX, JR., RODNEY L. FOX, ROSS LOUIS FOX,
FOX INDUSTRIES, FOX OYSTER CO., INC., FOX SEAFOODS, INC., ESTATE OF M. J. FRANICEVICH, ESTATE OF, FRANK GANIER, ABRAHAM J. HARNESS, NATHAN G. HARVEY, LAURIE A. DUPLESSIS HOLIDAY, HERMAN ISADORE, JR., J & P OYSTERS, INC.,

ESTATE OF MAYO P. JONES, JR., ROBERT M. KEENAN, DONALD J. KENNAIR, JR., JOSEPH LABRUZZO, ARTHUR L. LAFRANCE, JOEY G. LATAPIE, CLIFFORD LEBOUEF, JEAN LEBOUEF, LINDY LEBOUEF, LORNE LEBOUEF, ANTE LEPETICH, MATO LEPETICH, JOHN MARTINEZ, MEDERIC R. MEYER, MATTHEW DAVID MEYERS, MITCHEL MEYERS, CLADMON NARCISSE, FELIX NARCISSE, OLIVER B. NARCISSE, NICOLAE NITICA, RICHARD PATTERSON, PEAN, INC., IVO N. POPICH, ANTON N. POPICH, ARTHUR A. REDDICK, ADAM R. SERIGNE, LIONEL R. SERIGNE, O'NIEL N. SERIGNE, PHILLIP H. SIMMONS, HELEN T. SKANSI, NICK L. SKANSI, FRANK SLAVICH, JR., TACO, INC., ANN S. TESVICH, FRANCES LYNN TESVICH, IVO A. TESVICH, JOHN A. TESVICH, KUZMA I. TESVICH, JR., ESTATE OF KUZMA J. TESVICH, LISA K. TESVICH, MARIA TESVICH, NEDO TESVICH, PETER J. TESVICH, PETER L. TESVICH, TESVICH OYSTERS, INC., CHARLIE THOMPSON, STEVE THOMPSON, JOSEPH TINSON, AND NIKOLA ANTE VEKIC

VERSUS

THE STATE OF LOUISIANA
DEPARTMENT OF NATURAL RESOURCES
PETITION FOR DAMAGES - CLASS ACTION
FILED March 29, 1994

NOW INTO COURT, through undersigned counsel, come plaintiffs, who respectfully represent:

I.

Plaintiffs, ALBERT J. AVENAL, JR., ANTHONY BARTHELEMY CHRIS P. BARTHELEMY, GARY

BARTHELEMY, ANNA BUTSCHER BURAS, ANNA BESSIE BODDEN BURAS, NEAL BURAS, RALPH J. BURAS, RALPH J. BURAS JR., RICHARD BURAS, DONALD J. CAMPO JR., DONALD P. CAMPO, ERNEST CAMPO, MATHILDA GUERRA CAMPO, ESTATE OF TONY CAMPO, ANNA CIBILICH, PERO CIBILICH, RICHARD H. CLARK, CRESCENT OYSTER, INC., IRVIN CROSS, ESTATE OF JOSEPH CROSS, MELVIN CROSS, CLARENCE R. DUPLESSIS, CLARENCE R. DUPLESSIS, JR., ARTHUR ENCALADE, CARLISS J. ENCALADE, ESTATE OF JOSEPH ENCALADE, STANLEY ENCALADE, ENCALADE SEAFOOD, INC., M.J. FARAC, M.J. FARAC, JR., MAJA FARAC, SINAJKA FARAC, ANN P. FOX, CALVIN R. FOX, CALVIN R. FOX, JR., DALE. E. FOX, GENE L. FOX, JUSTIN RYAN FOX, KENNETH A. FOX, KENNETH RYAN FOX, MARIE O. FOX, RACHEL FOX, RHONDA FOX, RODNEY FOX, JR., RODNEY L. FOX, ROSS LOUIS FOX, FOX INDUSTRIES, FOX OYSTER CO., INC., FOX SEAFOODS, INC., ESTATE OF M. J. FRANICEVICH, ESTATE OF, FRANK GANIER, ABRAHAM J. HARNESS, NATHAN G. HARVEY, LAURIE A. DUPLESSIS HOLIDAY, HERMAN ISADORE, JR., J & P OYSTERS, INC., ESTATE OF MAYO P. JONES, JR., ROBERT M. KEENAN, DONALD J. KENNAIR, JR., JOSEPH LABRUZZO, ARTHUR L. LAFRANCE, JOEY G. LATAPIE, CLIFFORD LEBOUEF, JEAN LEBOUEF, LINDY LEBOUEF, LORNE LEBOUEF, ANTE LEPETICH, MATO LEPETICH, JOHN MARTINEZ, MEDERIC R. MEYER, MATTHEW DAVID MEYERS, MITCHEL MEYERS, CLADMON NARCISSE, FELIX NARCISSE, OLIVER B. NARCISSE, NICOLAE NITICA, RICHARD PATTERSON, PEAN, INC., IVO N. POPICH, ANTON N. POPICH, ARTHUR A. REDDICK, ADAM R. SERIGNE, LIONEL

R. SERIGNE, O'NIEL N. SERIGNE, PHILLIP H. SIMMONS, HELEN T. SKANSI, NICK L. SKANSI, FRANK SLAVICH, JR., TACO, INC., ANN S. TESVICH, FRANCES LYNN TESVICH, IVO A. TESVICH, JOHN A. TESVICH, KUZMA I. TESVICH, JR., ESTATE OF KUZMA J. TESVICH, LISA K. TESVICH, MARIA TESVICH, NEDO TESVICH, PETER J. TESVICH, PETER L. TESVICH, TESVICH OYSTERS, INC., CHARLIE THOMPSON, STEVE THOMPSON, JOSEPH TINSON, AND NIKOLA ANTE VEKIC, all residents of or conducting business in Plaquemines and St. Bernard Parishes, bring this action on their own behalf and on behalf of others similarly situated in the respects described below.

II.

This is a class action brought pursuant to La.C.C.P. art. 591 et. seq., on behalf of all individuals, partnerships, corporations and entities that currently own or have owned oyster leases located within the parishes of Plaquemines and St. Bernard that have been damaged as a result of the actions of the State of Louisiana, acting by and through the Department of Natural Resources, in diverting fresh water from the Mississippi River through the Caernarvon Freshwater Diversion Project into these areas where plaintiffs' oyster leases are located. The freshwater diversion resulted in lowered salinity levels and a consequent profusion of certain vegetation in the affected areas, killing the then-extant oysters and rendering the beds unquitable for further cultivation. Plaintiffs seek to recover compensation for the destruction of their leasehold interest which were appropriated for public use by the State of Louisiana through the actions of the Department of Natural Resources.

III.

Made defendants herein are the State of Louisiana and the Department of Natural Resources.

IV.

The State of Louisiana, acting through the Department of Natural Resources, and in conjunction with the United States Army Corps of Engineers, authorized, funded, constructed, and currently operate and maintain the Caernarvon Freshwater Diversion Project. After construction of the Caernarvon Freshwater Diversion Project structure was completed, defendants had the ability to dilute with freshwater the salinity or salt content in the water bottoms where plaintiffs' oyster leases are located. These activities have directly caused the destruction of plaintiffs' leasehold interests, thereby entitling plaintiffs to just compensation.

V.

The stated purposes of the Caernarvon Project include, but are not limited to, the enhancement of emergent marsh vegetation growth and the reduction of marsh loss. The Department of Natural Resources attempts to achieve this stated goal by allowing fresh water from the Mississippi River to flow through the Caernarvon structure into the salt water areas wherein plaintiffs' leases are located, thereby reducing the salinity and salt content in the waters where plaintiffs' leases are located.

VI.

As a direct result of the dilution of the salinity and salt content of the waters wherein plaintiffs' leases are

located, as well as the increased vegetation on or near the water bottoms wherein plaintiffs' leases are located, the productivity of Plaintiffs' leases have been damaged, as the reduced salinity of the waters wherein plaintiffs' leases are located makes plaintiffs' leases no longer capable of oyster growth and cultivation. The hereinabove described actions of defendant his resulted in a permanent and substantia interference with plaintiffs' use and enjoyment of their land amounting to a taking of an interest in plaintiffs' valuable property rights without compensation in violation of, Article I, Section 4 of the Louisiana Constitution of 1974, and the Fifth Amendment of the United States Constitution.

VII.

Defendant has not instituted any expropriation or condemnation proceeding to acquire all or any part of plaintiffs' land, nor has defendant paid or offered to pay to plaintiffs' any amount for the damages inflicted upon their oyster leases..

VIII.

As a direct result of the hereinabove described action of defendants, the productivity of plaintiffs' leases have been destroyed, resulting in a permanent and substantial interference with plaintiffs' use and enjoyment of their land amounting to a taking of an interest in plaintiffs' valuable property rights without compensation in violation of Article I, Section 4 of the Louisiana Constitution of 1974, and of the Fifth Amendment of the United States Constitution.

IX.

This action is appropriate for determination through the Louisiana Class Action Procedure (La. C.C.P. art. 591 et seq.) for the following reasons:

a) The large number of claimants present a level of numerosity better handled through the class action procedure as opposed to mass joinder of individual claims.

b) The common issues of law and fact pertaining that relate to and affect the rights of each member of the class and the relief sought, namely, whether the damage of the plaintiffs' oyster leases constitute a compensable taking by the State of Louisiana, predominate over the individual issues or quantum.

c) Requiring the institution of separate lawsuits would pose a serious risk of inconsistent adjudications and earlier separate determinations with a prejudicial effect on subsequent litigants.

d) Prosecution of separate actions would pose a serious threat of substantially impeding the ability of class members to protect their interests.

e) Petitioner's have sustained damages of the nature described above and are suitable representatives for the class.

f) The plaintiff representatives herein are represented by skilled attorneys in the field of oyster damage claims, and have successfully represented claimants in other litigation of this nature and who may be expected to handle this action in an expeditious and economical manner to the best

interests of all the class membership.

g) The class action is a superior procedural vehicle for the fair and efficient adjudication of this controversy, because:

1) The vast majority of the class members have no interest in controlling the litigation;

2) Such a method of proceeding would allow the Court to process all rightful claims in one proceeding;

3) It is desirable to concentrate all the litigation in one forum;

4) Class litigation is manageable considering the opportunity to afford reasonable notice of significant phases of the litigation to class members and permit distribution of recovery.

5) The determination of liability and the basis for the assessment of compensation may be made in the class action under the provisions of La. C.C.P. art. 593.1 (C) (1) (2) and (3), without the necessity of proof at that time as to the amount of those damages, thereby establishing guidelines for settlement and/or subsequent trials in the individual cases if necessary.

X.

Venue is proper in this parish pursuant to Article 74 of the Louisiana Code Of Civil Procedure and La. R.S. 13:5104, as this cause of action arises in Plaquemines Parish, as plaintiffs' leases are located within Plaquemines Parish, and/or because the wrongful conduct of the State

of Louisiana and the Department of Natural Resources occurred within Plaquemines Parish.

WHEREFORE, PLAINTIFFS PRAY that defendants be duly cited to appear and answer this petition; that this matter be ordered to proceed as a class action and that a suitable management plan be implemented pursuant to La. C.C.P. 593 (C); and after all legal delays and due proceeding had, that there be jJudgment in favor of plaintiffs and against defendants for damages, together with legal interest thereon from the date of the taking of an interest in the plaintiffs' property until paid, for all costs of these proceedings and for all general and equitable relief as provided by law.

Respectfully submitted,

/s/ Philip F. Cossich, Jr
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The Department of Natural Resources
State of Louisiana
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APPENDIX L

25TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NO. 38-266 DIVISION "B"

ALBERT J. AVENAL, JR., ET AL

VERSUS

DEPARTMENT OF NATURAL RESOURCES

FILED: DEC 15 1998 /s/ Becky H. Kaiszeski
DEPUTY CLERK

MOTION FOR SUMMARY JUDGMENT UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL

NOW INTO COURT, through undersigned counsel, comes Defendant, the State of Louisiana, through the Department of Natural Resources ("DNR"), and moves this Honorable Court for summary judgment on the basis that the Plaintiffs' claims should be dismissed under the equitable doctrine of collateral estoppel, all for the reasons set forth in the attached Memorandum in Support of this Motion.

RESPECTFULLY SUBMITTED,

RICHARD P. IEYOUB
Attorney General

BY: /s/ Andrew C. Wilson
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and
BURKE & MAYER, Of Counsel
Attorneys for State of Louisiana
Department of Natural Resources

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document has been served upon all counsel of record by depositing same in the U.S. Mail, postage pre-paid, addressed to them at their offices, this 15th day of December, 1998.

/s/ James Savoy

25TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NO. 38-266 DIVISION "B"

ALBERT J. AVENAL, JR., ET AL

VERSUS

DEPARTMENT OF NATURAL RESOURCES

FILED:_____ /S/BECKY H. KALISZESKI
DEPUTY CLERK

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT RELATED TO COLLATERAL ESTOPPEL

MAY IT PLEASE THE COURT:

On November 12, 1996, the Court of Appeals for the Federal Circuit dismissed the claims originally raised by these same Plaintiffs on the same issues in the Court of Federal Claims, holding that no taking took place.[1] DNR now moves for summary judgment dismissing these same Plaintiffs" claims based upon the same issues under the doctrine of defensive collateral estoppel.

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[1] Avenal v. United States, 100 F.3d 933 (Fd. Cir. 1996).

FACTS

On March 29, 1994, the Plaintiffs in this matter filed the instant class action alleging a taking under the Fifth Amendment of the United States Constitution and Article 1, Section 4 of the Louisiana Constitution of 1974.[2] The Plaintiffs alleged that their oyster leases on State water bottoms had been damaged by the freshwater outfall from the Caernarvon freshwater diversion project. Shortly thereafter, on April 26, 1994, Plaintiffs filed what amounts to a nearly identical lawsuit in the Court of Federal Claims against the United States Army Corps of Engineers ("the Corps").[3] A comparison of the allegations set forth in the Federal Complaint and the Petition filed in the 25th Judicial District Court reveals that the cases deal with the same major issue: Whether a taking occurred as a result of the operation of the Caernarvon freshwater diversion structure.

For example, paragraph 5 of the Federal Complaint reads as follows:

> 5.
>
> The stated purposes of the Caernarvon Project include, but are not limited to, the enhancement of the emergent marsh vegetation growth and a reduction of marsh loss. The United States Army Corps of Engineers attempts to achieve this stated goal by allowing fresh water from the Mississippi River to flow through the Caernarvon structure into the salt-water areas.[4]

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[2] Exhibit "A".

[3] Complaint in C.A. No. 94-261 (L) filed 4/26/94 (Exhibit"B").

[4] Exhibit "B".

The State Court Petition reads similarly:

V.

The stated purposes of the Caernarvon Project include, but are not limited to, the enhancement of the emergent marsh vegetation growth and a reduction of marsh loss. The Department of Natural Resources attempts to achieve this stated goal by allowing fresh water from the Mississippi River to flow through the Caernarvon structure into the salt water areas wherein plaintiffs' leases are located, thereby reducing the salinity and salt content in the waters where plaintiffs' leases are located.[5]

The sixth paragraph of both pleadings also reads similarly:

6.

When the freshwater diverted from the Mississippi reaches the water bottoms leased by plaintiffs from the State of Louisiana, it dilutes the salinity of the waters and deposits silt on the water bottoms. As a direct result of the dilution of the salinity of the waters wherein plaintiffs' leases are located, as well as the increased vegetation and bacteria on or near the water bottoms where plaintiffs' leases are located, and the silt deposits, the productivity of plaintiffs' leases has been and is being destroyed, as the altered conditions of the waters wherein plaintiffs' leases are located

---

[5] Exhibit "A

makes Plaintiff's leases no longer capable of oyster growth and cultivation.[6]

VI.

As a direct result of the dilution of the salinity and salt content of the waters wherein plaintiffs' leases are located,, as well as the increased vegetation on or near the water bottoms wherein plaintiffs' leases are located, the productivity of plaintiffs' leases have been damaged, as the reduced salinity of the waters wherein plaintiffs' leases are located makes plaintiffs' leases no longer capable of oyster growth and cultivation. The hereinabove described actions of defendant has resulted in a permanent and substantial interference with Plaintiffs' use and enjoyment of their land amounting to a taking of an interest in Plaintiffs' valuable property rights without compensation in violation of Article I, Section 4 of the Louisiana Constitution of 1974, and the Fifth Amendment of the United States Constitution.[7]

Finally, paragraph 7 of the Federal Complaint and paragraph VIII of the State Petition also read similarly:

7.

The hereinabove described actions of defendant have resulted in permanent and substantial interference with plaintiffs' use and enjoyment of their land amounting to a taking of an interest in plaintiffs'

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[6] Exhibit "B"

[7] Exhibit "A"

taking of an interest in plaintiffs' valuable property rights without compensation in violation of the Fifth Amendment of the United States Constitution.[8]

8.

As a direct result of the hereinabove described action of defendants, the productivity of plaintiffs' leases have been destroyed, resulting in a permanent and substantial interference with plaintiffs' use and enjoyment of their land amounting to a taking of an interest in plaintiffs' valuable property rights without compensation in violation of Article I, Section 4 of the Louisiana Constitution of 1974, and of the Fifth Amendment of the United States Constitution.[9]

APPLICABLE LAW

Takings Law

Based upon the comparison set forth above, the issue in both cases is whether the freshwater outfall from the Caernarvon freshwater diversion structure has resulted in a taking under constitutional law. Both cases involve a taking under the Fifth Amendment of the United States Constitution. The United States Supreme Court has indicated that the "takings" test acquires that a claimant first demonstrate a compensable property interest, and

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8 Exhibit "B'

9 Exhibit "A"

afterwards the Court then applies three factors involving:

(1) The character of the governmental actions;
(2) The economic impact on the claimant; and
(3) The extent to which the governmental actions interfere with reasonable investment-backed expectations.[10]

The Louisiana takings test consists of the following inquiries:

(1) Whether the property rights have been effected;
(2) Whether the property has been taken or damaged in a constitutional sense; and
(3) Whether the taking or damage is for a public purpose.[11]

In analyzing the second prerequisite of the Louisiana three prong takings test, i.e., in determining whether the property has been taken or damaged in a constitutional sense, the Louisiana Supreme Court draws freely upon jurisprudence interpreting the Fifth Amendment of the United States Constitution and makes direct parallels between the Fifth Amendment of the United States Constitution and Article 1, Section 4 of the Louisiana Constitution.[12]

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10 Penn Central Transp. v. New York City, 483 U.S. 104, 124, 98 S.Ct-2646, 2659 (1978).

11 State through Dep't of Transp. & Dev. v. Chambers Inv Co., 91-1202 (La. 3/2/92) 595 So.2d 598, 603 (La. 1992).

12 See, e.g., Louisiana Seafood Management Counsel v. Louisiana Wildlife and Fisheries Comm'n, 97-1367 (2/29/98) 715 So.2d 387, 391-392.

Accordingly, both the factual and legal issues before the Court in the instant matter are the same.

COLLATERAL ESTOPPEL

The Louisiana Supreme Court has unequivocally stated that when a Louisiana state Court is required to determine the preclusive effects of a judgment rendered by a Federal Court on a federal question, it is federal law which must be applied.[13] As a result, where prior proceedings takes place in Federal Court, the preclusive effect of those prior federal proceedings is an issue of federal law.[14] The Federal rule of preclusion governs any federal judgment, even when the Court renders a decision of state law issues.[15] Accordingly, the preclusive effect of the prior federal judgment in the Avenal federal proceedings is determined according to federal law (the law of the Court issuing the initial decision), regardless of whether the second suit has been filed in state Court.

Although the civil law does not look favorably upon equitable doctrines such as estoppel, federal law specifical-

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13 Reeder v. Succession of Palmer, 92-2965, 92-3002 (La. 9/3/93) 623 So.2d 1268, 1271 (La. 1993), cert. denied, 5 10 U.S. 1165 (1994).

14 Nagle v. Lee, 807 F.2d 435, cert. denied, (5th Cir. 1987); Chemtron Com. v. Business Funds, Inc., 682 F.2d 1149 (5th Cir. 1982), vacated on other grounds, 460 U.S. 1007, cert. denied, 406 U.S. 1013 (1983); Stovall v. Price Waterhouse Co., 652 F.2d 537, 540-41 (5th Cir. 1981); Commercial Box & Lumber Co. v. Uniroyal, Inc., 623 F.2d 371, 373 (5th Cir. 1980); Aerojet General Co. v. Askew, 511 F.2d 710 (5th Cir.), dismissed, 423 U.S. 908, (1975); Restatement (2d) of Judgments Section 87 (1982).

15 Recoveredg L.P. v. Pentecost, 44 F.M. 1284, 1290 n. 11 (5th Cir. 1995.).

ly recognizes a doctrine of collateral estoppel, in fact, defensive collateral estoppel, applicable herein.

Collateral estoppel depends on three elements:

(1) The issue at stake must be identical to the one involved in the prior action;

(2) The issue must have been actually litigated in the prior action; and

(3) The determination of the issue in the prior action must have been a necessary part of the judgment in that earlier action.[16]

The United States Supreme Court has specifically held that collateral estoppel may be asserted by a party even if that party was not involved in the prior litigation.[17] This is known as defensive collateral estoppel wherein a plaintiff is estopped from asserting a claim that the plaintiff has previously litigated and lost against another defendant.[18] Stated succinctly defensive collateral estoppel may be urged by a party to the second suit who was not even a party to the first suit.[19]

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16 Recoveredge L.P., 44 F.3d at 1290; Sheerin v. Davis, 3 F.3d 113, 114 (5th Cir. 1993).

17 Parklane Hosiery Co., Inc. v. Shore, 439U.S. 322, 326-333, 99 S.Ct. 649-52 (1979).

18 Id.

19 Id.

Under the circumstances of the instant matter, DNR can apply the doctrine of defensive collateral estoppel such that the Plaintiffs' claims in these State proceedings should be dismissed in their entirety. First, the takings issue is identical.[20] Second, the takings issue was actually litigated in the Federal Circuit which found there was no taking.[21] Finally, the takings issue was a necessary part of the Federal Judgment. In fact, the decision on the takings issue was the core of the dispute. Accordingly, the doctrine of defensive collateral estoppel requires the dismissal of the Plaintiffs' claims in the instant state litigation as well.

CONCLUSION

Inasmuch as federal law controls on the issue of the preclusive effect of the prior federal decision, DNR submits the doctrine of defensive of collateral estoppel has direct application herein. This doctrine disposes of Plaintiffs' claims in their entirety and, therefore, this litigation should be at an end.

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[20] Flowers v. Phelps, 964 F.2d 400, 401 (5th Cir. 1992) (amended opinion).

[21] Avenal v. United States, 100 F.3d 933, 938 (Fed. Cir. 1996).

RESPECTFULLY SUBMITTED,

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and
BURKE & MAYER, Of Counsel
Attorneys for State of Louisiana
Department of Natural Resources

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document has been served upon all counsel of record by depositing same in the U.S. Mail, postage pre-paid, addressed to them at their offices, this 15th day of December, 1998.

/s/ illegible

APPENDIX M

SUPREME COURT OF LOUISIANA

WRIT APPLICATION FILING SHEET

No. 00 CC 1077

ALBERT J. AVENAL, JR., ET AL.,
Plaintiffs-Respondents

VERSUS

THE STATE OF LOUISIANA AND THE,
DEPARTMENT OF NATURAL RESOURCES,
Defendants-Applicants

APPLICATION FOR WRITS OF CERTIORARI OR REVIEW (CIVIL) FROM THE MARCH 15, 2000 DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS,
CIVIL APPEAL NO. 99-C-0127
ON REVIEW FROM THE 25TIl JDC FOR THE PARISH OF PLAQUEMINES, CA. NO.
38-266, DIVISION "Bt'
HONORABLE WILLIAM A. ROE, JUDGE PRESIDING

FILED ON BEHALF OF DEFENDANTS/APPLICANTS
THE STATE OF LOUISIANA AND THE DEPARTMENT OF
NATURAL RESOURCES

EXPEDITED CONSIDERATION AND STAY ORDER REQUESTED

RICHARD P. IEYOUB Attorney General
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DAVID L. CARRIGEE - #3892
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and
BURKE & MAYER, of Counsel
Attorneys for The State of Louisiana through the
Department of Natural Resources

April 14, 2000

LOUISIANA SUPREME COURT
CIVIL
PRIORITY FILING SHEET

State of Louisiana, Depaqrtment of Natural Resources
Applicant's Name

1. What is the nature of the priority? Application made by:
PLAINTIFF **DEFENDANT** OTHER (Circle one)

Specify: Pursuant to RULE V1. Section 4, a special assignment is requested on the grounds that tState of Louisiana is a party. Further, this matter is impressed with the public interest, insofar as this matter will have potentially devastating effects on the fiscal status of the State because the ruling of the Fourth Circuit attempts to change the law applicable to actions for inverse condemnation under State Law. If allowed to stand, the ruling will have significant, adverse effects on all governmental action be State, Parish and local government as well as upon the State's efforts to save the State's rapidly disappearing coastal areas.

2. Is a hearing or trial date set? NO **YES**
DATE: **Status Conference on 4/17/00**
TIME: **1:00 p.m.**
Jury trial? NO **YES** Any out of state witnesses? **NO** YES

3. Was relief applied for in the trial court? **NO** YES
By: PLAINTIFF **DEFENDANT**
Stay: **DENIED**/GRANTED Until: _____
Ruling of Dist. Court: **Stay Denied**

Was an application made to the Court of Appeal? **NO**
YES

Which Circuit? 1ST 2ND 3RD **4TH** 5TH
Application was made by: PLAINTIFF
DEFNDANT OTHER
Date of Court of Appeal action: **4/12/00**
Court of Appeal action: **Stay denied**

If you did not apply to the Circuit Court of Appeal state why:

---

5. How and when will applicant be adversely affected if relief is not granted?

Plaintiffs have already requested a Status Conference before the Court has scheduled same for Monday, April 17, 2000, which means a new trial date can be set at any time thereafter. There are numerous discovery issues which will have to be explored in detail on a major level prior to the trial date and there aresix pending writ applications before the Fourth Circuit which may have to be briefed in detail upon consideration by the Fourth Circuit. All of this action may be unnecessary if the Supreme Court should reinstate the Fourth Circuit's original opinion dismissing Plaintiff's claims in their entirety.

6. List of Lead Counsel & Judge involved in case:

Name: Scott LaBarre (Plaintiffs/Respondents)
Home (504) 286-5828
Night Bus ( ) ____
PHONE #'s -- Day Bus (504) 456-8600

Name: Andrew C. Wilson (Defendants/Applicants)
Home (504) 737-4405
Night Bud ( ) _____
PHONE#'s -- Day Bus (504) 569-2900

Name:_____
PHONE #s -Day Bus ( ) _____
Dist. Ct. -- Judge: Honorable William A. Roe
PHONE#'s - Bus Day (504) 392-6690

CERTIFICATION

I am requesting Priority consideration of this application. Pursuant to Supreme Court Rule 10. Section 2(e), I have notified all counsel and unrepresented parties by telephone or other equally prompt means of communication that said writ application has been or is about to be filed in this court and that I have served on all parties at interest of their counsel, by a means equal to the means used to effect filing in this court.

/s/ illegible
SIGNATURE

SUPREME COURT OF LOUISIANA
WRIT APPLICATION FILING SHEET

NO. _____

TO BE COMPLETED BY COUNSEL
or PRO SE LITIGANT FILING APPLICATION

TITLE

ALBERT J. AVENAL, JR., ET AL
VS.
THE STATE OF LOUISIANA
THROUGH THE DEPARTMENT
OF NATURAL RESOURCES

Applicant:La. Department of Natural Resources
Have there been any other filings in this
Court in this matter? X Yes ___ No
Are you seeking a Stay Order? Yes
Priority Treatment? Yes
If so you MUST complete & attach a Priority
Form

LEAD COUNSEL/PRO SE LITIGANT INFORMATION

APPLICANT:
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RESPONDENT:
Name: Scott LaBarre
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Metairie, LA 70002
Phone No. (504) 456-8600
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Pleading being filed: X In prop. person, In Forma Pauperis

Attach a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.

TYPE OF PLEADING

X Civil, ___ Criminal, ___ Bar, ___ Civil Juvenile, ___ Criminal Juvenile, ___ Other

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court: _____ Docket No. _____
Judge/Commissioner/Hearing Officer: _____
Ruling Date: _____

DISTRICT COURT INFORMATION

Parish and Judicial District Court: Plaquemines Parish, 25th JDC Docket Number: 38-266
Judge and Section: Hon. William A. Roe, Div. B
Date of Ruling/Judgment: January 5, 1999

APPELLATE COURT INFORMATION

Circuit: Fourth Filing Date: January 15, 1999 (writ granted, later refused on rehearing)
Docket No. 99-C-0127 Applicant in Appellate Court: State of Louisiana, Department of Natural Resources Ruling Date: March 3, 1999 Panel of Judges: Waltzer, Gulotta, Ciaccio, Klees & McKay En Banc: ___

REHEARING INFORMATION

Applicant: Plaintiffs, Albert J. Avenal, Jr., et al. Date Filed: March 17, 1999 Action on Rehearing: Granted Ruling Date: March 15, 2000 Panel of Judges: Waltzer, Gulotta, Ciaccio, Klees & McKay En Banc: _____

PRESENT STATUS

X Pre-Trial, Hearing/Trial Scheduled dated: status conference set for Monday, April 17, 2000 , _____ Trial in Progress, _____ Post Trial
Is there a stay now in effect? No Has this pleading been filed simultaneously in any other court? No
If so, explain briefly:

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct tot eh best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties.

/s/ ANDREW C. WILSON

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A. Trial Court's Judgment dated January 5, 1999.

B. Original Opinion, CA No. 99-0127 (La.App. 4th Cir. 3/3/99).

C. Opinion on Rehearing, CA No. 99-0127 (3/15/00), ___ So.2d ___ dissent of Judge Miriam Waltzer.

D. Trial Court's Denial of Stay, CA No. 38-266 "B" (4/11/00).

E. Denial of Stay, CA No. 00-0855 (La. App. 4th Cir. 4/12/00).

F. State Petition, CA No. 38-266, 25th JDC, Parish of Plaquemines.

G. Albert J. Avenal, Jr. et al. v. The United States of America, United States Court of Federal Claims, No. 94-261-L.

H. Avenal v. United States, 33 Fed.Cl. 778, 781 (Fed. Cl. 1995).

I. Avenal v. United States, 100 F.3d 933 (Fed. Cir. 1996).

J. Order Granting Certiorari, CA No. 99-0127 (La.App. 4th Cir. 3/26/99).

STATEMENT OF CONSIDERATION FOR THE GRANTING OF WRITS

Pursuant to Rule X, Sections 1 and 3, of the Rules of the Supreme Court of Louisiana, Defendants/Applicants, the State of Louisiana and the Department of Natural Resources (collectively "DNR"), respectfully suggest that this Writ Application presents the following considerations for the granting of writs:

1. The decision of the Fourth Circuit Court of Appeals presents a **direct conflict** with the decisions of several bodies of jurisprudence. Specifically, insofar as the choice of federal common law, the Fourth Circuit's decision conflicts not only with other constitutional law decisions of the **Fourth Circuit**[1] itself, but with constitutional law decisions from the other **Louisiana appellate courts**[2] and the

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1 Stone v. Entergy Services, Inc., 99-0236 *3 (La.App. 4th Cir. 8/18/99), 744 So.2d 141, 142; writ denied, 99-2719 (La. 11/24/99), 750 So.2d 989; McCollough v. Dauzat, 98-1293 *3 (La.App. 3rd Cir. 3/3/99), 736 So.2d 914, 915; Schlesinger v. Herzog, 95-1127 *21 (La.App. 4th Cir. 4/3/96), 672 So.2d 701, 714; City of New Orleans v. Badine Land Ltd., 94-2631 *6 (La.App. 4th Cir. 6/29/95), 657 So.2d 770, 773; Tolis v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, 94-1444 *8 (La.App. 4th Cir. 5/16/95), 655 So.2d 747, 753.

2 Trich v. Crescent Turn Key & Engineering, L.L.C., 99-310 *5 (La.App. 5th Cir. 9/28/99), 744 So.2d 689, 692; Andrepont v. Andrepont, 97-1643 *3 (La.App. 3rd Cir. 4/1/98), 711 So.2d 759, 761; Williams v. Insurance Company of North America, 96-0847 *3 (La.App. 4th Cir. 3/19/97), 692 So.2d 654, 656; Rochon v. Whitley, 96-0835 *4 (La.App. 1st Cir. 2/14/97), 691 So.2d 189, 192; Tye v. Co-Mar Offshore Operators, Inc., 95-0094 *3 (La.App. 1st Cir. 10/6/95), 669 So.2d 438, 439.

Louisiana Supreme Court.[3] The Fourth Circuit's elimination of consideration of a claimant's "distinct investment-backed expectations" in the context of takings law conflicts directly with the body of jurisprudence emanating from **the United States Supreme Court,**[4] **the Louisiana First Circuit Court of Appeals,**[5] **and, the courts of all the other States** that have considered this issue.[6] Insofar as the Fourth

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3 Terrebonne Fuel & Lube, Inc. v. Placid Refining Company, 95-0654 *14 (La. 1/16/96), 666 So.2d 624, 632-3; Reeder v. Succession of Palmer, 623 So.2d 1268, 1271 (La. 1993); Pilie & Pile v. Metz, 547 So.2d 1305, 1308 (La. 1989).

4 Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); Good v. United States, 189 F.3d 1355, 1360 (Fed.Cir. 1999), citing Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed.Cir. 1994), cert. denied, 529 U.S. ____, ____ S.Ct. ____ (4/3/00).

5 Layne v. City of Mandeville, 93-0046 (La.App. 1st Cir. 12/29/93), 633 So.2d 608, 610, writ denied, 94-0268 (La. 3/25/94), 635 So.2d 234.

6 See e.g. (1) **Alaska**: State of Alaska v. Arctic Slope Regional Corp., 834 P.2d 134, 139 (Alaska 1991); (2) **Arizona**: Laidlaw Waste Systems, Inc. v. City of Phoenix, 815 P.2d 932, 935 (Ariz.Ct.App. 1991); (3) **California**: Kavanau v. Santa Monica Rent Control Board, 941 P.2d 851, 862-863 (Calif. 1998); (4) **Colorado:** U.S. West Communications v. City of Longmont, 948 P.2d 509, 523 (Colo. 1997); (5) **Connecticut:** Bauer v. Waste Management of Connecticut, 662 A.2d 1179, 1198 (Conn. 1995); (6) **Florida**: Golf Club of Plantation, Inc. v. City of Plantation, 717 So.2d 166, 170 (Fla. 4th DCA 1998); (7) **Idaho:** Sprenger, Grubb & Assoc., Inc. v. City of Hailey, 903 P.2d 741, 747 (Idaho 1995); (8) **Indiana:** Ragucci v. Metro. Dev. Comm'n of Marion County, 702 N.E.2d 677, 683-684 (Indiana 1998); (9) **Iowa**: Bormann v. Board of Supervisors for Kossuth County, 584 N.W.2d 309, 316 (Iowa 1998); (10)**Kentucky**: Commonwealth of Kentucky v. Stearns Coal and Lumber Co., 678 S.W.2d 378, 381 (Kentucky 1984); (11) **Maryland**: Offen v. County Council of Prince Georges County, 625 A.2d 424, 442 N.E.2d 1300, 1303 (Mass. 1996); (12) **Massachusetts:** Leonard v.

Circuit's ruling suggests that the jurisprudence interpreting the United States Constitution should not be used in analyzing a "taking" under the Louisiana Constitution, the Fourth Circuit's ruling conflicts

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(footnote 6 continued)

Town of Brimfield, 666 (13) **Minnesota**: Zeman v. City of Minneapolis, 552 N.W.2d 548, 552 (Minn. 1996); (14) **Missouri**: Clay County, County Commission of Clay v. Harley and Susie Bogue, Inc., 988 S.W.2d 102, 107 (Mo.Ct.App. 1999); (15) **Nebraska**: Whitehead Oil Co. v. City of Lincoln, 515 N.W.2d 401, 408 (Nebraska 1994); (16) **Nevada:** Kelly v. Tahoe Regional Planning Agency, 855 P.2d 1027, 1034 (Nevada 1993); (17) **New Hampshire**: Quirk v. Town of New Boston, 663 A.2d 1328, 1334 (N.H. 1995); (18) **New Jersey:** Bernardsville Quarry, Inc. v. Borough of Bernardsville, 608 A.2d 1377, 1386 - 1388 (N.J. 1992); (19) **North Carolina:** Sherrill v. Town of Wrightsville, 334 S.E.2d 357 (N.C.App. 1986); (20) **North Dakota:** Southwest Cass Water Resource Dist. v. Burlington Northern R.R. Co., 527 N.W.2d 884, 894 - 895 (N.D. 1995); (21) **Ohio**: State v. State Teachers Retirement Board, 697 N.E.2d 644, 650 -651 (Ohio 1998); (22) **Oregon:** Dodd v. Hood River County, 855 P.2d 608, 615 -616 (Oregon 1993); (23) **Pennsylvania**: Mock v. Dept. of Environmental Resources, 623 A.2d 940, 945-949 (Penn. 1993); (24) **Rhode Island:** Woodland Manor III Assoc. v. Keeney, 713 A.2d 806, 813 (R.I. 1998); (25) **Texas**: Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 935-938 (Texas 1998); (26) **Vermont:** Chioffi v. City of Winooski, 676 A.2d 786, 790 (Vermont 1996); (27) **Virginia:** Board of Supervisors of Prince William County v. Omni Homes, Inc., 481 S.E.2d 460, 465- 466 (Virginia 1997); (28) **Washington**: Presbytery of Seattle v. King County, 787 P.2d 907, 915 (Washington 1990); (29) **Wisconsin**: Zealy v. City of Waukesha, 534 N.W.2d 917, 921 - 924 (Wis.Ct.App. 1995), rev'd on other grounds, 548 N.W.2d 528 (Wis. 1996); (30) **Wyoming:** Cheyenne Airport Board v. Rogers, 707 P.2d 717, 731 (Wyoming 1985).

directly with the **Louisiana Supreme Court**,[7] other **Louisiana appellate courts**,[8] as well as the **Fourth Circuit itself**.[9]

2.The Fourth Circuit's ruling presents **significant unresolved issues of law** insofar as the newly created defense of the Claimants' "bad faith" in the context of inverse condemnation law. The issues associated with a claimant's prior knowledge of governmental action as a governmental defense to a "takings" claim has **never been addressed by this Honorable Court**. Over the strong dissent of Judge Miriam Waltzer, arguably one of the more experienced Fourth Circuit judges insofar as takings are

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7 Louisiana Seafood Management Council v. Louisiana Wildlife & Fisheries Commission, 97-1367 (La. 5/19/98), *8-9, 715 So.2d 387, 392.

8 LaSalle v. Iberia Parish Council, 99-216 *10 (La.App. 3rd Cir. 6/2/99), 741 So.2d 812, 818 - 819; Standard Materials, Inc. v. City of Slidell, 96-0684 (La.App. 1st Cir. 9/23/97), 700 So.2d 975; Layne v. City of Mandeville, 93-0046 (La.App. 1st Cir. 12/29/93), 633 So.2d 608, 610, writ denied, 94-0268 (La. 3/25/94), 635 So.2d 234; Annison v. Hoover, 517 So.2d 420, 423 (La.App. 1st Cir. 12/22/87); writ denied by 519 So.2d 148 (La. 2/12/88); Ursin v. New Orleans Aviation Board, 506 So.2d 947, 955 (La.App. 5 Cir. 4/15/87); reversed for different reasons by 515 So.2d 1087 (La. 1987).

9 State Department of Social Services v. City of New Orleans, 95-1757, 1758 *7 (La.App. 4th Cir. 5/29/96), 676 So.2d 149, 154.

concerned,[10] the Fourth Circuit has also created new law unsupported by legal authority through the cross-application of the defense of "bad faith" from expropriation law and reinsertion of this concept in the context of "takings" or inverse condemnation litigation. The Fourth Circuit has also gone one step further in its creation of new law by ruling that the only defense to a "takings" claim brought against any Louisiana governmental entity is the Claimant's "bad faith." If this becomes the law, this essentially makes a Claimants' recovery automatic merely upon (1) an allegation of a "taking," and, (2) a prima facie showing that a claim is not fraudulent, which is the government's burden of proof for "bad faith" in an expropriation proceeding.[11] Such a rule of law has never been applied or perhaps even considered by

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10 See, e.g. Haspel & Davis Mill. & Planting Co. Ltd. v. Board of Levee Com'rs of Orleans Levee Dist., 95-0233 (La.App. 4th Cir. 9/4/96), 680 So.2d 159, 135 Oil & Gas Rep. 513 (La.App. 4th Cir., 9/4/96); Vogt v. Board of Levee Com'rs of Orleans Levee Dist., 95-1187 (La.App. 4th Cir. 9/4/96), 680 So.2d 149; Gravolet v. Board of Com'rs for Grand Prairie Levee Dist., 95-2477 (La.App. 4th Cir. 6/12/96, 676 So.2d 199; State Department of Social Services v. City of New Orleans, 95-1757, 1758 *7 (La.App. 4th Cir. 5/29/96), 676 So.2d 149, 154; Edgecombe v. Board of Levee Com'rs of Orleans Levee Dist., 94-1493 (La.App. 4th Cir. 2/23/95), 650 So.2d 1249, 131 Oil & Gas Rep. 298; Henry v. State, 94-0658 (La.App. 4th Cir. 11/30/94), 646 So.2d 519; Board of Com'rs of New Orleans Exhibition Hall Authority v. Missouri Pacific Railroad Co., 625 So.2d 1070 (La.App. 4th Cir. 9/22/93), writ denied, 627 So.2d 638 and 630 So.2d 802 (La. 1994) and cert. denied, 512 U.S. 1220, 114 S.Ct. 2707 (1994).

11 State Department of Highways v. Vermillion Development Co., 249 So.2d 161, 171 (La. 1971).

any Louisiana Court in inverse condemnation cases.

3.The Fourth Circuit's opinion also has the effect of **overruling or modifying controlling precedents** from the **Louisiana Supreme Court** related to the preclusive effect of a prior federal decision as issued by the **Louisiana Supreme Court**[12] and the Courts of Appeal[13] including the **Fourth Circuit itself.**[14]

4.The Fourth Circuit's opinion is based upon **an erroneous interpretation and application of the United States Constitution and law applicable thereto** including the Supremacy Clause, and federal common law, as well as the Louisiana Constitution, Article I Section 4, related to "takings" and **applicable Louisiana law**. The State is the party Defendant herein; thus, if the Fourth Circuit's decision is allowed to stand, the decision will **cause material injustice to the State and the people of the State which will, in turn, significantly affect the public interest** by creating a chilling effect upon all governmental action for fear of provoking "takings" claims. Under the Fourth Circuit's opinion a "takings" claim cannot be overcome unless the government can

12 Reeder v. Succession of Palmer, 623 So.2d 1268, 1271 (La. 1993).

13 Trich v. Crescent Turn Key & Engineering, L.L.C., 99-310 *5 (La.App. 5th Cir. 9/28/99), 744 So.2d 689, 692; Andrepont v. Andrepont, 97-1643 *3 (La.App. 3rd Cir. 4/1/98), 711 So.2d 759, 761; Williams v. Insurance Company of North America, 96-0847 *3 (La.App. 4th Cir. 3/19/97), 692 So.2d 654, 656; Rochon v. Whitley, 96-0835 *4 (La.App. 1st Cir. 2/14/97), 691 So.2d 189, 191; Tye v. Co-Mar Offshore Operators, Inc., 95-0094 *3 (La.App. 1st Cir. 10/6/95), 669 So.2d 438, 439.

14 Stone v. Entergy Services, Inc., 99-0236 *3 (La.App. 4th Cir. 8/18/99), 744 So.2d 141; writ denied, 99-2719 (La. 11/24/99), 750 So.2d 989; McCollough v. Dauzat, 736 So.2d at 915.

prove ***fraud*** on the part of the Claimant. This chilling effect will extend far beyond bankrupting the State's coastal restoration projects with claims such as those presented here for oyster lease damages. The Fourth Circuit's ruling will allow every special interest group or isolated individual to bring a claim for inverse condemnation or a "taking" whenever some type of allegedly adverse economic ripple occurs following any form of governmental action.

5.DNR also submits that **review is warranted under the applicable law.** DNR's reasoning is based upon the premise that when the lower courts' action is arguably incorrect, and a reversal will terminate the litigation, and when there is no disputed fact to be resolved, judicial efficiency and fundamental fairness to the litigants dictates that the merits of the application for supervisory writs should be decided in an attempt to avoid the waste of time and expense of a possibly useless future trial on the merits.[15] Further, this Honorable Court has recognized that due to their unique nature, issues related to class actions such as the instant matter, require supervisory review.[16]

6.Next, in light of Act. 483 of 1997 which amended La. C.C.P. Art. 966 related to **summary judgment proceedings**, it is respectfully suggested that this Honorable Court should review this matter since **a reversal of the Fourth Circuit will be dispositive of the entire case.** Those amendments are to be applied

15 Herlitz Construction Company, Inc. v. Hotel Investers of New Iberia, Inc., 396 So.2d 878 (La. 1981).

16 Cotton v. Gaylord Chemical, 680 So.2d 1187 (La. 1996).

retroactively as well as prospectively.[17] Review at this time is consistent with the legislative intent in that the summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions such as this, and the procedure is favored and shall be construed to accomplish these ends.[18] This Honorable Court's review of this matter at this time accomplishes all of these legislative aims and goals.

7.Finally, DNR respectfully requests **expedited consideration** given the fact that immediately after the Fourth Circuit's adverse ruling, the Plaintiffs moved to set this matter for trial. A status conference was thereafter immediately set in this matter at which time it is contemplated based upon the history of prior proceedings in this matter that a trial date will be set within months. With the setting of the status conference, **DNR has timely sought a stay** which was denied by both the Trial Court[19] and the Fourth Circuit[20] despite the implications of this writ application and the fact that there are still six writ applications pending before the Fourth Circuit. DNR therefore **seeks expedited relief as well as a stay of all proceedings** in the Trial Court and in the Fourth Circuit.

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17 Perry Waller v. American Seafoods Company, 97-0302, p. 1 (La.App. 4th Cir. 10/1/97), 700 So.2d 1306, 1307, writ not considered, 97-2769 (La. 1/30/98), 709 So.2d 693.

18 La. C.C.P. Art. 966 A(2) (1997).

19 Exhibit "D," Trial Court's Denial of Stay, CA No. 38-266 "B" (4/11/00).

20 Exhibit "E," Denial of Stay, CA No. 00-0855 (La.App. 4th Cir. 4/12/00).

STATEMENT OF THE CASE

A. THE PARALLEL PROCEEDINGS IN STATE AND FEDERAL COURTS BELOW.

Albert J. Avenal, Jr. and other oyster leaseholders/fishermen filed the present class action in the 25th Judicial District Court for the Parish of Plaquemines on March 29, 1994 on behalf of all persons holding oyster leases on state water bottoms in Breton Sound.[21] These Plaintiffs alleged that a "taking" had occurred without "just compensation" in violation of the Fifth Amendment of the U.S. Constitution and Article I, Section 4, of the Louisiana Constitution because their oyster leases were adversely affected by the freshwater outflow from the Caernarvon freshwater diversion structure, located on the east bank of the Mississippi River in Plaquemines Parish.

Meanwhile, on April 26, 1994, Albert Avenal and these same representative Plaintiffs filed suit in the U.S. Court of Federal Claims[22] against the United States, i.e., the United States Army Corps of Engineers, which had designed, financed and built the Caernarvon freshwater diversion structure. In that suit, these same Plaintiffs alleged the same "taking" under the Fifth Amendment of the U.S. Constitution, the very issue raised in the state court proceeding, and also sought class certification.

A comparison of the allegations set forth in the federal Complaint and the Petition filed in the 25th Judicial

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21 Exhibit "F," State Petition, CA No. 38-266, 25th JDC, Parish of Plaquemines.

22 Exhibit "G," Albert J. Avenal, Jr. et al. v. The United States of America, United States Court of Federal Claims, No. 94-261-L.

District Court reveals that the cases deal with the identical issue: whether a taking occurred as a result of the operation of the Caernarvon freshwater diversion structure.

For example, paragraph 5 of the federal Complaint reads as follows:

> 5.
>
> The stated purposes of the Caernarvon Project include, but are not limited to, the enhancement of the emergent marsh vegetation growth and a reduction of marsh loss. The United States Army Corps of Engineers attempts to achieve this stated goal by allowing fresh water from the Mississippi River to flow through the Caernarvon structure into the saltwater areas.[23]

The state court Petition reads similarly:

> V.
>
> The stated purposes of the Caernarvon Project include, but are not limited to, the enhancement of the emergent marsh vegetation growth and a reduction of marsh loss. The Department of Natural Resources attempts to achieve this stated goal by allowing fresh water from the Mississippi River to flow through the Caernarvon structure into the salt water areas wherein plaintiffs' leases

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23 Id.

are located, thereby reducing the salinity and salt content in the waters where plaintiffs' leases are located.[24]

The sixth paragraph of both pleadings also reads similarly:

6.

When the freshwater diverted from the Mississippi reaches the water bottoms leased by plaintiffs from the State of Louisiana, it dilutes the salinity of the waters and deposits silt on the water bottoms. As a direct result of the dilution of the salinity of the waters wherein plaintiffs' leases are located, as well as the increased vegetation and bacteria on or near the water bottoms where plaintiffs' leases are located, and the silt deposits, the productivity of plaintiffs' leases has been and is being destroyed, as the altered conditions of the waters wherein plaintiffs' leases are located makes Plaintiffs' leases no longer capable of oyster growth and cultivation.[25]

VI.

As a direct result of the dilution of the salinity and salt content of the waters wherein plaintiffs' leases are located, as well as the increased vegetation on or near the water

24 Exhibit "F," State Petition.

25 Exhibit "G," Federal Complaint.

> bottoms wherein plaintiffs' leases are located, the productivity of plaintiffs' leases have been damaged, as the reduced salinity of the waters wherein plaintiffs' leases are located makes plaintiffs' leases no longer capable of oyster growth and cultivation. The hereinabove described actions of defendant has resulted in a permanent and substantial interference with Plaintiffs' use and enjoyment of their land amounting to a taking of an interest in Plaintiffs' valuable property rights without compensation in violation of Article I, Section 4 of the Louisiana Constitution of 1974, and the Fifth Amendment of the United States Constitution.[26]

Finally, paragraph 7 of the federal Complaint and paragraph VIII of the state Petition also read similarly:

> 7.
>
> The hereinabove described actions of defendant have resulted in permanent and substantial interference with plaintiffs' use and enjoyment of their land amounting to a taking of an interest in plaintiffs' valuable property rights without compensation in violation of the Fifth Amendment of the United States Constitution.[27]

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26 Exhibit "F," State Petition.

27 Exhibit "G," Federal Complaint.

VIII.

As a direct result of the hereinabove described action of defendants, the productivity of plaintiffs' leases have been destroyed, resulting in a permanent and substantial interference with plaintiffs' use and enjoyment of their land amounting to a taking of an interest in plaintiffs' valuable property rights without compensation in violation of Article I, Section 4 of the Louisiana Constitution of 1974, and of the Fifth Amendment of the United States Constitution.[28]

With the exception of the identity of the named governmental defendant, the Petition filed in the 25th Judicial Court is virtually indistinguishable from the Complaint filed in federal court. Although the names of the Defendants were changed, the issue remains identical - whether a "taking" has occurred as a result of the operation of the Caernarvon freshwater diversion structure.

In response to the federal Complaint, the United States moved for summary judgment on several grounds, all related to the "takings" issue. Among these, the United States asserted that the Plaintiffs had no compensable expectancy or property interest in continued saltwater intrusion or elevated salinity levels associated with the Mississippi River levee system. The United States also argued that the Plaintiffs had no reasonable investment-backed expectations in any oyster leases in historically fresh

28 Exhibit "F," State Petition.

areas of the Breton Sound Area which was the subject of the litigation. In support of its motion for summary judgment, the United States provided the court with a detailed and comprehensive analysis of the history of freshwater diversions for environmental enhancement and coastal restoration, including the Caernarvon Project. The evidence presented significant information and documentation in support of the United States' position that there were no reasonable investment-backed expectations in those leases since the Plaintiffs were put on notice as to the planning and construction of the project decades ahead of time.

The Plaintiffs filed a lengthy opposition memorandum, fully addressing the issues raised in the United States' motion for summary judgment. As the lower federal court would eventually note, Plaintiffs conceded many of the factual issues related to notice. Significantly, the court noted the undisputed effect that the freshwater diversion structure to be constructed at Caernarvon would have on the oyster fishermen:

> "The zone where conditions will become too fresh and not favorable for oyster cultivation as a result of the [Caernarvon] diversion coincides with an area that was historically (prior to 1960) too fresh and not favorable for oyster cultivation." Def's Proposed Findings of Fact No. 8, filed Feb. 7, 1995 (citations omitted). ***Plaintiffs do not dispute this fact.*** (Emphasis added)[29]

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29 Avenal v. United States, 33 Fed.Cl. 778, 781 (Fed. Cl. 1995). See Exhibit "H".

The court further noted:

> The Caernarvon project was designed not only to abate saltwater intrusion, but also to abate marine tidal invasion. ***At the July 31, 1984 public hearing, the President of the Louisiana Oyster Dealers and Growers indicated his support for both the Caernarvon project and freshwater diversion structures generally.*** (Emphasis added)[30]

B. ULTIMATE DETERMINATION IN FEDERAL COURT.

On August 2, 1995, the Court of Federal Claims granted the United States' Motion for Summary Judgment, finding that the leaseholders hold no compensable property interest in the salinity of the waters above their leased acreage, an area which had been historically too fresh for oyster cultivation prior to the construction of the Mississippi River levee system.[31] The lower court's opinion also specifically addressed the United States' argument related to the lack of reasonable investment-backed expectations in the subject leases.

On November 12, 1996, the U.S. Court of Appeals for the Federal Circuit affirmed the lower court's judgment, but on different grounds.[32] The Court held that these same oyster lessees could not have had reasonable investment-backed expectations such that their oyster leases would give

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30 Id. See Exhibit "H".

31 Id. See Exhibit "H".

32 Avenal v. United States, 100 F.3d 933 (Fed. Cir. 1996). See Exhibit "I".

them rights protected from the planned freshwater diversions of the state and federal governments.[33] The Federal Circuit held that under entrenched constitutional law the absence of reasonable investment-backed expectations barred the Plaintiffs' recovery.[34] In reaching this conclusion, the Federal Circuit restated and confirmed the federal position regarding regulatory takings under the federal law as set out by the U.S. Supreme Court.[35]

The Court reiterated the lower court's findings with respect to Plaintiffs' prior notice of the Caernarvon project and its effects on the oyster industry, resulting in their lack of reasonable investment-backed expectations:

> It is hard for them [the Plaintiffs] to claim surprise, however, that the pre-existing salinity conditions, created at least in part by earlier government activity, were not left alone, but were again tampered with to their (this time) disadvantage.
>
> ... (T)hey cannot here insist on a guarantee of non-interference by government when they well knew or should have known that, in response to widely shared public concerns, ***including concerns of the oyster industry itself***, government actions were being planned that would directly affect their new economic investments. These concerns and

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33 Id. at 937. See Exhibit "I".

34 Id.

35 Id. citing, Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659 (1978).

> plans date back to the early part of the century, and beginning in the 1950's and 1960's were actively being pursued by state and federal agencies. They were certainly a part of the environment in which the raising and harvesting of oysters in the Louisiana marshes were conducted. (Emphasis added).[36]

The Court concluded by stating:

> In light of the history of events in this case, plaintiffs, as a matter of law must be assumed to have known that their rights to use the bottom-lands for oystering were subject to the inevitable changes that the anticipated government program would bring about.[37]

C. STATE COURT PROCEEDINGS TO DATE

While the federal proceedings had terminated, the State court proceedings in the 25th JDC, Parish of Plaquemines continued. In accordance with the court's pretrial scheduling order, on December 15, 1998, DNR filed several motions for summary judgment, including one based on the issue of collateral estoppel.[38] DNR asserted that the decision in the federal proceeding dismissing Plaintiffs'

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36 Id. at 937.

37 Avenal, 100 F.3d at 937. See Exhibit "I".

38 Judge Roe took DNR's other motions for summary judgement under advisement. Thus, the issues raised on those motions are not made a part of this Writ Application.

claims on summary judgment had a preclusive effect upon the state court proceedings and thus, the present suit against the State should likewise be dismissed. This matter came for hearing before the Honorable William A. Roe on January 5, 1999. Judge Roe denied all of DNR's Motions including DNR's Motion for Summary Judgment Based Upon the Doctrine of Collateral Estoppel.[39] From the Trial Court's adverse decision, DNR filed an application for supervisory writs and/or writs of review before the Fourth Circuit Court of Appeals on January 15, 1999. The Fourth Circuit then issued a stay order regarding further proceedings pending its action on the writ application.

On March 3, 1999, a five judge panel for the Fourth Circuit issued a 3-2 opinion authored by Judge Miriam Waltzer granting the writ application, and reversed the Trial Court's denial of summary judgment.[40] The Fourth Circuit panel found that the issue of the preclusive effect of a prior federal decision was a matter of federal law, and on this basis determined that the Plaintiffs' claims were barred by the federal common law of collateral estoppel.[41] All five

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39 See Exhibit "A".

40 Exhibit "B," Original Opinion, CA No. 99-0127 (La.App. 4th Cir. 3/3/99), Majority opinion by Judge Waltzer in which Judge Pro Tempore James C. Gulotta and Judge Pro Tempore Philip C. Ciaccio joined; Judge James F. McKay, III issued a separate opinion in which he concurred in part and dissented in part. Chief Judge Robert J. Klees joined in Judge McKay's opinion. The five judge panel apparently resulted from the preliminary decision of the original three judge panel to overrule the Trial Court, all in accordance with Uniform Appellate Rule 1 - 5.

41 Id. at 6 - 11.

judges agreed that the Plaintiffs' inverse condemnation claims under the Fifth Amendment of the United States Constitution were barred by the doctrine of collateral estoppel.[42]

The Plaintiffs thereafter sought rehearing on March 17, 1999, requesting that the panel compare the facts in the two cases to see if the elements of collateral estoppel had been met, i.e., whether the fact situations matched. On March 26, 1999 the Fourth Circuit issued a writ of certiorari to the 25th JDC[43] so as to allow the Court "to consider whether the issue actually litigated in the prior federal action is identical to an issue at stake in this subsequent state action."[44]

Following oral argument on September 15, 1999, the same five judge panel of the Fourth Circuit reversed itself 3-2, not on the basis of a comparison of the two Courts' records, but rather on entirely legal bases. Essentially Judge Ciaccio changed his vote issuing written reasons in a concurring opinion accompanying the majority opinion. The Fourth Circuit panel's majority opinion created new law to overrule its prior opinion, holding that: (1) collateral estoppel is inapplicable under any circumstances in any Louisiana Court despite federal and state law to the contrary; (2) the legal standard applicable to "takings" under Louisiana constitutional law differs from that under federal constitutional law; (3) the United States Supreme Court's requisite consid-

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42 Id. See concurring/dissenting opinion of Judge James McKay, III.

43 Exhibit "J".

44 Exhibit "C," Opinion on Rehearing, CA No. 99-0127 (3/15/00), ___ So.2d ___ dissent of Judge Miriam Waltzer at p. 2.

eration of reasonable or distinct investment-backed expectations to determine whether a taking has occurred is simply "irrelevant" under Louisiana law; and, (4) the only bar to compensation under either an expropriation or inverse condemnation action in Louisiana is the "bad faith" of the claimant.

From this adverse ruling based entirely upon new law, DNR seeks review. Given the import of this decision on the State's entire coastal restoration program as well as the potential exposure of all governmental entities at every level in Louisiana for inverse condemnation claims as a result of this ruling, DNR seeks expedited review. DNR also seeks herein a stay order as regards all proceedings in this matter since there are presently six pending writ applications at the Fourth Circuit, and, the Trial Court has set this matter for an immediate status conference to set a trial date which could be within months. DNR has previously sought and obtained stays at the Fourth Circuit level on this matter but was denied such relief at this time.[45] DNR had also exhausted all stay remedies at the Trial Court level.[46]

ASSIGNMENT OF ERRORS

Defendants/Applicants submit that the Trial Court and/or the Fourth Circuit have erred as follows:

1.The lower courts erred by failing to dismiss the Plaintiffs' claims which were barred by the doctrine

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45 Exhibit "E".

46 Exhibit "D".

of collateral estoppel as applied under the federal common law applicable to the state court proceeding, and by failing to give full faith and credit to a prior federal decision.

2.The Fourth Circuit erred by creating an artificial distinction between what constitutes a "taking" under the United States and Louisiana Constitutions.

3.The Fourth Circuit committed a gross departure from the established and existing jurisprudence of the United States Supreme Court and many of the courts of the United States as well as the Louisiana courts by eliminating consideration of reasonable and/or distinct investment-backed expectations from a court's analysis of "takings" or inverse condemnation claims.

4.The Fourth Circuit erred in eliminating all governmental defenses to claims for "takings" or inverse condemnation claims except for the defense of "bad faith."

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47 Exhibit "B," Albert J. Avenal, Jr., et al. v. The State of Louisiana, The Department of Natural Resources, CA No. 99-C-0127, original opinion dated 3/3/99 granting DNR's writ and reversing Trial Court judgment, p. 6.

48 Exhibit "C," Opinion on rehearing, CA No. 99-C-0127, dissent, *2 (La.App. 4th Cir. 3/15/00).

SUMMARY OF ARGUMENT

The Fourth Circuit's ruling presents a frontal assault on three major entrenched areas of constitutional law: (1) the supremacy of federal law; (2) the constitutional analysis of a "taking" or inverse condemnation claim; and, (3) the legal concepts of expropriation and inverse condemnation under Louisiana law.

If allowed to stand, this decision will completely transform the law related to inverse condemnation or "takings" in Louisiana by eliminating all governmental defenses available to State, Parish and local government for "takings" claims except for a new defense of "bad faith," or fraud, heretofore never applied in the context of inverse condemnation. Absent proof of fraud, all "takings" claims are valid, and any governmental action is now subject to challenge and compensation. Such challenges will include regulatory rulings, zoning changes, physical proximity or occupation claims, delays or detours, wetland regulation, permit issuance, and in fact, any governmental decision which might have any economic impact whatsoever, no matter how slight, as long as the claims are based on a "takings" or inverse condemnation theory.

The Fourth Circuit not only eliminated governmental defenses, but also jettisoned the United States Supreme Court's second fundamental requirement for a takings claim to proceed: that the claimant have reasonable "investment-backed expectations" in the property that is allegedly taken. To reach this result the Fourth Circuit merged statutory concepts of expropriation with inverse condemnation, a concept defined by a fast growing body of jurisprudential law, primarily federal in origin.

Lastly, the Fourth Circuit refused to apply the federal interpretation of the doctrine of collateral estoppel to the Plaintiffs' claims in these proceedings which are identical to those brought by these same Plaintiffs in a parallel federal proceeding. Had the Fourth Circuit done so, the Plaintiffs' claims would have been dismissed.

ARGUMENT

I.THE TRIAL COURT AND LATER THE COURT OF APPEALS SHOULD HAVE DISMISSED THE PLAINTIFFS' CLAIMS UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL PURSUANT TO APPLICABLE FEDERAL COMMON LAW.

A. The Preclusive Effect of a Prior Federal Decision Is an Issue of Federal Law.

Judge Miriam G. Waltzer of the Fourth Circuit succinctly explained in her original majority opinion why the Fourth Circuit was bound to apply federal common law related to collateral estoppel in this matter, citing precedent from this Honorable Court:

> We must apply federal law to determine the effect of the judgment, rendered in the federal action, on the proceedings in state court. Reeder v. Succession of Palmer, 623 So.2d 1268, 1271 (La. 1993). We must apply federal law to "determine the **preclusive effects**

> of a judgment rendered by a federal court exercising federal question jurisdiction." Id.[47]

After the 3-2 opinion issued reversing the original Fourth Circuit Judgment and Judge Waltzer's scholarly opinion, Judge Waltzer set out the applicable law which formed the basis for her original reasoning in the dissent she prepared in which Judge James C. Gulotta joined:

> In deciding the preclusive effect of a federal judgment, we are bound by Louisiana law (and arguably the United States Constitution) to apply federal law. Reeder v. Succession of Palmer, 623 So.2d 1268, 1271 (La. 1993). Collateral estoppel, or issue preclusion, is a concept firmly entrenched in federal law. Recoveredge, L.P. v. Pentecost, 44 F.3d 1284, 1291 (5th Cir. 1995). Although the leaseholders did not sue the State of Louisiana in the prior federal suit, such an identity of parties is not required to apply the doctrine of collateral estoppel, or issue preclusion. Blonder - Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 798 (1970).[48]

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47 Exhibit "B," Albert J. Avenal, Jr., et al. v. The State of Louisiana, The Department of Natural Resources, CA No. 99-C-0127, original opinion dated 3/3/99 granting DNR's writ and reversing Trial Court judgment, p. 6.

48 Exhibit "C," Opinion on rehearing, CA No. 99-C-0127, dissent, *2 (La.App. 4th Cir. 3/15/00).

Judge Waltzer's original opinion written for the majority as well as her dissent to the eventual 3-2 opinion on rehearing both frames and capsulizes DNR's position on this issue. In line with this Honorable Court's opinion in Reeder, Louisiana courts have repeatedly and consistently held that the preclusive effect of a prior federal decision is an issue of federal common law, not Louisiana State law.[49] The majority opinion on rehearing mistakenly relied upon cases dealing with the preclusive effect of prior *state*, not federal, decisions.[50]

The preclusive effect of a prior federal decision emanates from the United States Constitution's Supremacy Clause[51] and Full Faith and Credit Clause[52] as well as the federal "full faith and credit" statute[53] all of which require each State to give the same effect to the judgments of federal courts as those judgments have in the jurisdictions where

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49 Terrebonne Fuel & Lube, Inc. v. Placid Refining Company, 95-0654 *14 (La. 1/16/96), 666 So.2d 624, 632-3; Trich v. Crescent Turn Key & Engineering, L.L.C., 99-310 *5 (La.App. 5th Cir. 9/28/99), 744 So.2d 689, 692; Andrepont v. Andrepont, 97-1643 *3 (La.App. 3rd Cir. 4/1/98), 711 So.2d 759, 761; Williams v. Insurance Company of North America, 96-0847 *3 (La.App. 4th Cir. 3/19/97), 692 So.2d 654, 656; Rochon v. Whitley, 96-0835 *4 (La.App. 1st Cir. 2/14/97), 691 So.2d 189, 191; Schlesinger v. Herzog, 95-1127 *21 (La.App. 4th Cir. 4/3/96), 672 So.2d 701, 714; Tye v. Co-Mar Offshore Operators, Inc., 95-0094 *3 (La.App. 1st Cir. 10/6/95), 669 So.2d 438, 439; City of New Orleans v. Badine Land Ltd., 94-2631 *6 (La.App. 4th Cir. 6/29/95), 657 So.2d 770, 773; Tolis v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, 94-1444 *8 (La.App. 4th Cir. 5/16/95), 655 So.2d 747, 753.

50 Steptoe v. Lallie Kemp Hospital, 634 So.2d 331, 335 (La. 1994); Welch v. Crown Zellerbach Corp., 359 So.2d 154, 156 (La. 1978).

51 Art. VI, Section 2.

52 Art. IV, Section 1.

53 28 U.S.C. §1738.

rendered.[54] Indeed, in Pilie & Pilie v. Metz,[55] this Honorable Court noted that "the principle that a state court must apply federal law in deciding upon at least the central core of res judicata effects of *any* federal court judgment is immanent within the constitution and laws establishing our federal system".[56] The collateral estoppel component of res judicata is included within the full faith and credit mandate of this principle.[57]

Consistent with this rule of law, the Louisiana courts have likewise recognized the preclusive effect of a prior federal court determination or decision and have applied the federal common law rule of collateral estoppel.[58] In fact, an earlier opinion by Judge James McKay, III, the author of the majority opinion in this matter, applied a collateral estoppel analysis under federal common law based upon his conclusion that, "federal law governs the preclusive effects of a federal judgment."[59] Moreover, the entire panel in this matter recognized the applicability of collateral estoppel by dis-

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54 Heck v. Humphrey, 512 U.S. 475, 488 n. 9, 114 S.Ct. 2364, 2373 n. 9 (1994); Magnolia Petroleum Company v. Hunt, 320 U.S. 430, 437- 438, 64 S.Ct. 208, 212- 213 (1943); Stoll v. Gottlieb, 305 U.S. 165, 167 - 171, 59 S.Ct. 134, 135 - 138 (1938); Crescent City Livestock Landry & Slaughter-House Co. v. Butchers' Union Slaughter-House & Live-Stock Landing Co., 120 U.S. 141, 160, 7 S.Ct. 482, 474 (1887); Embry v. Palmer, 107 U.S. 3, 9 - 10, 2 S.Ct. 25, 27 - 30 (1872).

55 547 So.2d 1305, 1308 (La. 1989).

56 Id. at 1308, citing 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, section 4468 (1981).

57 United States v. Silliman, 167 F.2d 607, 612, 620 - 621 (3rd Cir.), cert. denied, 335 U.S. 825, 69 S.Ct. 48 (1948).

58 See, e.g., McCollough v. Dauzat, 98-1293 *3 (La.App. 3rd Cir. 3/3/99), 736 So.2d 914, 915.

59 Stone v. Entergy Services, Inc., 99-0236 *3 (La.App. 4th Cir. 8/18/99), 744 So.2d 141; writ denied, 99-2719 (La. 11/24/99), 750 So.2d 989.

missing the Plaintiffs' claims based upon the Fifth Amendment "taking" theories. Thus, the majority has already acknowledged that the facts necessary to prove a taking are missing from this matter, and should have dismissed federal and state claims.

"Application of collateral estoppel in this matter is also consistent with the general principles or policy reasons behind the concept of res judicata of which collateral estoppel forms a part, i.e., to promote judicial efficiency and final resolution of disputes by preventing needless relitigation. Indeed, not too long ago the Louisiana legislature spoke on the viability of this policy, by relaxing the rules of res judicata.[60] In this same vein, as former Chief Justice John A. Dixon, Jr. had written well before those amendments:

> It is implicit in the concept of a judicial system that controversies be finally resolved so that parties may enjoy their rights and so that conflicting legal obligations may not be imposed on an individual; litigation must end at some point. Precluding relitigation prevents inefficient use of the courts' resources, reduces the possibility of harassment through vexatious suits, and helps maintain respect for the judicial process by guarding against inconsistent decisions.[61]

If this Honorable Court should choose to apply applicable federal common law, i.e., the doctrine of collater-

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60 Acts 1990, No. 521 §1, eff. Jan. 1, 1991 amending La. R.S. 13:4231 (see also comments related to same).

61 Dixon, Booksh, Zimmering, Res Judicata in Louisiana Since Hope v. Madison, 51 Tul.L.Rev. 611 (1977), (footnotes in quotation omitted.)

al estoppel, in accordance with the applicable federal constitutional and statutory law and consistent with prior opinions of the Louisiana courts, DNR submits that the Plaintiffs' claims must be dismissed under the applicable federal common law associated with the federal courts' interpretation of the doctrine of collateral estoppel, here defensive collateral estoppel.

B. Application of the Federal Common Law of Collateral Estoppel Results in the Dismissal of Plaintiffs' Claims.

The *federal* law of collateral estoppel, which the trial court is required to apply, consists of four elements:

(1)The issue at stake must be identical to the one involved in the prior action;

(2)The issue must have been actually litigated in the prior action;

(3)The determination of the issue in the prior action must have been a necessary part of the judgment in that earlier action; and

(4)There is no special circumstance that would make it unfair to apply the doctrine.[62]

All of the factors necessary for the court to apply the federal law of collateral estoppel have been met. First, as can be seen from the federal Complaint and the state court Petition, the takings issue is identical. Second, the takings

62 Copeland, supra, at 1423.

issue was actually litigated in both the federal trial court and federal appellate court, with the appellate court specifically affirming summary judgment based on the fact that the Plaintiffs had no reasonable investment-backed expectations in their leases.[63] More importantly, the Fourth Circuit's opinion on rehearing does not indicate that there is any factual distinction between the two cases. As to the third element of the collateral estoppel test, the takings issue was a necessary part of the federal judgment. In fact, the decision on the takings issue was the core of the dispute. Fourth and finally, there is no special circumstance that would make it unfair to apply the doctrine of collateral estoppel.

The United States Supreme Court has specifically held that collateral estoppel may be asserted by a party even if that party was not involved in the prior litigation.[64] This is known as defensive collateral estoppel wherein a plaintiff is estopped from asserting a claim that the plaintiff has previously litigated and lost against another defendant.[65] As the United States Fifth Circuit has held, "collateral estoppel bars a plaintiff from assailing the defendants for proceeding without change upon a course of conduct previously held lawful against plaintiff's identical attack."[66] In other words, the defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely "switch-

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63 See Exhibit "I".

64 Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326-333, 99 S.Ct. 649-52 (1979).

65 Id.

66 Exhibitors Poster Exch., Inc. v. National Screen S.C., 517 F.2d 110, 114 (5th Cir. 1975).

ing adversaries."[67] Stated succinctly, defensive collateral estoppel may be urged by a party to the second suit who was not even a party to the first suit.[68]

As the Federal Circuit affirmed the Court of Federal Claims' dismissal of the Plaintiffs' complaint on summary judgment and all of the elements of collateral estoppel have been met, the Trial Court should have applied the doctrine of defensive collateral estoppel, thereby dismissing the Plaintiffs' claims in the instant litigation in their entirety.

II. THE FOURTH CIRCUIT'S MAJORITY OPINION ATTEMPTS TO ELIMINATE "INVESTMENT-BACKED EXPECTATIONS" FROM CONSID ERATION IN THE ANALYSIS OF INVERSE CONDEMNATION CLAIMS CONTRARY TO ESTABLISHED CONSTITUTIONAL PRECEDENT.

A. "Investment-Backed Expectations" Form the Second Element of the Three Pronged Test for Takings under Established Constitutional Law.

The Federal Circuit dismissed the Plaintiffs' claims based upon the fact that the Plaintiffs had no reasonable investment-backed expectations in their oyster leases as required under the United States Supreme Court decision, Penn Central Transportation Company v. New York City.[69]

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67 Parklane Hosiery, supra, at 329, 651, citing Bernhard v. Bank of America Nat. Trust & Savings Assn., 19 Cal.2d 807, 813, 122 P.2d, 892 at 895.

68 Id.

69 438 U.S. 104, 98 S.Ct. 2646 (1978).

The Penn Central inquiry entails a balancing test in which (1) the economic impact, (2) reasonable investment-backed expectations, and (3) the character of the governmental action at issue are weighed to determine whether compensation is mandated.[70] As part of its burden of proof, the claimant must show that the effects of the governmental action upon the property at issue frustrated reasonable expectations.[71] As recently as last year, the Federal Circuit reaffirmed the requisite takings analysis that "for any regulatory takings claim to succeed, the Claimant must show that the government's regulatory restraint interfered with his investment-backed expectations in a manner that requires the government to compensate him."[72] Moreover, a reasonable investment-backed expectation must be more than a "unilateral expectation or an abstract need."[73] Given the importance the Courts have placed on this concept, "investment-backed expectations," the requisite second element of the constitutional "takings" test has proved so important that

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70 Penn Central, 438 U.S. at 124 - 128, 98 S.Ct. 2646, 2659 (1978).

71 Florida Rock Industries, Inc. v. United States, 45 Fed.Cl. 21, 38 (1999).

72 Good v. United States, 189 F.3d 1355, 1360 (Fed.Cir. 1999), cert. denied, 529 U.S. ____, ____ S.Ct. ____ (4/3/00), citing Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed.Cir. 1994).

73 Ruckelshaus v. Monsanto, 467 U.S. 986, 1004 - 1006, 104 S.Ct. 2862, 2874 (1984); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161, 101 S.Ct. 446, 451 (1980).

it has been the subject of repeated and extensive comment.[74]

The Fourth Circuit's ruling suggests that Louisiana does not follow United States Constitutional law in any shape or form. This is not the case. In reality, like the established federal taking test, Louisiana has a formula for recovery under an inverse condemnation theory. In determining whether a claimant is entitled to eminent domain compensation in an action for inverse condemnation, our Louisiana Supreme Court has adopted a three-prong analysis:

> (1)Whether a person's legal right with respect to a thing or an object has been affected;

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74 See, e.g., No Taking Because Plaintiff Did Not Have Reasonable Investment-Backed Expectations: Lloyd A. Good, Jr. v. United States, No. 97-5138 (Fed. Cir. Aug. 31, 1999), 14 No. 9 NAAG Nat'l Envtl. Enforcement J. 27, October 1999; Washburn, "Reasonable Investment-Backed Expectations" As A Factor In Defining Property Interest, 49 Wash. U.J. Urb. & Contemp. L. 63, Summer 1996; Friedmann, Taking Claim Fails When Landowner Had No Investment-Backed Expectations, 10 NO. 4 N.Y. Real Est. L. Rep. 3, February 1996; Mandelker, Investment-Backed Expectations In Taking Law, 27 Urb. Law. 215, Spring 1995; Oswald, Cornering The Quark: Investment-Backed Expectations and Economically Viable Uses In Takings Analysis, 70 Wash. L. Rev. 91, January, 1995; Note: The Effect Of Notice Of Land Use Regulations Upon Investment- Backed Expectations And Takings Challenges, 23 Stetson L. Rev. 201, Fall, 1993; Spencer, Dashed "Investment-Backed" Expectations: Will The Constitution Protect Property Owners From Excesses In Implementation Of The Growth Management Act?, 16 U. Puget Sound L. Rev. 1223, Spring, 1993; Goldman-Carter, Protecting Wetlands And Reasonable Investment-Backed Expectations In The Wake Of Lucas v. South Caroline Coastal Council, 28 Land & Water L. Rev. 425, 1993; Ackerman, Searching For A Standard For Regulatory Takings Based On Investment-Backed Expectations, 36 Emory L.J. 1219, Fall, 1987.

(2)If it is determined that property is involved, whether the property, either a right or thing *has been taken or damaged in a constitutional sense*; and

(3)Whether the taking or damaging is for a public purpose under Article I, Section 4 of the Louisiana Constitution.[75]

Thus, to recover on an inverse condemnation in Louisiana, a claimant must establish that property "has been taken or damaged in a constitutional sense," the same burden of proof as is set out under the three-pronged federal constitutional test for recovery on an inverse condemnation theory. Not surprisingly, Louisiana courts look to the immense body of federal "takings" jurisprudence to determine whether a "taking" has occurred.

B. The Louisiana Supreme Court and the Lower Courts Have Consistently Applied United States Constitutional Law to Determine Whether a "Taking" Has Occurred in the Context of Inverse Condemnation Jurisprudence.

As Judge Waltzer observed in her original majority opinion in this matter, "Louisiana courts have consistently considered federal law in analyzing whether particular facts constitute a taking of property in similar **inverse condemnation** suits."[76] For example, in, Annison v. Hoover,[77] the Court took the opportunity to study the issue of inverse con-

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75 Id. at 603.

76 Exhibit "B," Original Opinion at p. 8 (emphasis original).

77 517 So.2d 420 (La. App. 1st Cir. 1987).

demnation with respect to a zoning ordinance enacted by the City of Denham Springs. The Court analyzed the inverse condemnation issue not under expropriation law, but rather under the United States Supreme Court precedents of First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California[78] and Keystone Bituminous Coal Association v. DeBenedictis .[79] Importantly, the Annison Court also cites the United States Supreme Court case of Agins v. Tiburon,[80] which applies the Penn Central balancing test, ***the same test the Federal Circuit applied in affirming the lower court's grant of summary judgment in Avenal,*** to an inverse condemnation case.[81]

Other Louisiana courts have similarly decided takings/inverse condemnation cases, relying upon the most recent United States Supreme Court decisions addressing that issue. For example, in Layne v. City of Mandeville[82], the plaintiffs filed a takings claim alleging that a zoning regulation denied them the business use of their property. Plaintiffs in that matter initially contended that the Erie doctrine, which dictates that the substantive laws of States must govern, even where federal constitutional precepts are at issue controlled. Plaintiffs further argued that Louisiana case law and property concepts should override federal takings jurisprudence. The Court rejected such assertions, stating:

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78 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

79 480 U.S. 263, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987).

80 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).

81 Annison, 517 So.2d at 423. Both First Evangelical and DeBenedictis also cite the Penn Central decision.

82 633 So.2d 608 (La. App. 1st Cir. 1993).

> The Erie doctrine is a federal rule which requires federal courts sitting in diversity to apply the substantive law of the States in which they are sitting. Erie has no application in state court. Moreover, because of the supremacy clause, ***all state law is subordinate to and may not detract from federal constitutional rights. U.S. Const. art. VI, cl. 2. Thus, we cannot agree with plaintiffs' suggestion that we are not bound by federal constitutional law in this case.*** (Emphasis added)[83]

The Layne Court then analyzed the plaintiffs" takings claim under the recently decided United States Supreme Court decision in Lucas v. South Carolina Coastal Council[84]. The trial court in Layne had granted defendant's motion for summary judgment by interpreting Lucas as stating a rule that a taking occurs only when an owner is deprived of all economically beneficial use of his land. The First Circuit disagreed, pointing out that Lucas also states that an owner not deprived of all use must undergo a fact specific determination of the economic impact of the regulation on the claimant and ***the extent to which the regulation has interfered with distinct investment-backed expectations.***[85] In other words, the First Circuit held that the trial

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83 Id. at 610.

84 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

85 Layne, 633 So.2d at 611, citing Lucas v. South Carolina Coastal Council, 112 S.Ct. at 2895.

court should have applied the Penn Central balancing test, the same test the Federal Circuit applied in affirming the lower court's ***grant of summary judgment in Avenal.***

The First Circuit again surveyed federal constitutional law in deciding an inverse condemnation case in Standard Materials v. City of Slidell.[86] The Court began its analysis by illustrating the similarities between the Fifth Amendment to the Constitution of the United States, made applicable to the States through the Fourteenth Amendment[87], and the Louisiana equivalent, Article I, Section 4 of the Louisiana Constitution. The Court then affirmed the dual structure of federal takings law, noting that a constitutional "taking" can be a physical taking or a regulatory taking.[88] The Court also cited with approval the holding in Layne, supra, that the determination of whether a taking has occurred is a factual determination,[89] ***i.e. the same test the Federal Circuit applied in affirming the lower court's grant of summary judgment in Avenal.***

More recently, this Honorable Court applied federal inverse condemnation/"takings" law in Louisiana Seafood Management Council v. Louisiana Wildlife & Fisheries Commission[90] in determining whether a compensable tak-

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86 700 So.2d 975 (La. App. 1st Cir. 1997).

87 Id. at 984, citing Dolan v. City of Tigard, 512 U.S. 374, 383-384, 114 S.Ct. 2309, 2316 129 L.Ed.2d 304 (1994).

88 Id. at 990, n. 11, citing Yee v. City of Escondido, California, 503 U.S. 519, 522, 112 S.Ct. 1522, 1526, 118 L.Ed.2d 153 (1992) and Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 105 S.Ct. 3108, 3116, 87 L.Ed.2d 126 (1985).

89 Id. at 984.

90 715 So.2d 387 (La. 1998).

ing of property interests of commercial fishermen had occurred as a result of the recently enacted gill net ban law. This Court initially noted the parallels of the "takings" clause under the Fifth Amendment of the United States Constitution and its counterpart under Article I, Section 4 of Louisiana Constitution.[91] This Court then focused on the interplay between federal takings law and state takings law under the Louisiana Constitution. Citing the United States Supreme Court case of Pennsylvania Coal v. Mahon,[92] this Court recognized the similarities and parallels between federal "takings" law and Louisiana takings law, echoing the Mahon decision as follows:

> Indeed, the takings clause of the State Constitution expressly provides that the state has the right in the exercise of its police powers to impose reasonable regulations on private property.[93]

Finally, this Court applied federal constitutional law concepts in rejecting the Plaintiffs' argument that the gill net ban law diminished the economic value of their equipment. Quoting Andrus v. Allard,[94] this Court stated that:

> (L)oss of future profits - unaccompanied by any physical property restriction - provides a slender reed upon which to rest a taking

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91 Id. at 391-392.

92 260 U.S. 393, 413, 43 S. Ct. 158, 159, 67 L.Ed. 322 (1922).

93 Id., citing, Louisiana Constitution Article I, Section 4.

94 444 U.S. 51, 65, 100 S.Ct. 318, 326-27, 62 L.Ed. 2d. 210 (1979).

> claim... The interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.[95]

Consistent with the approach this Honorable Court and the First Circuit have followed, but prior to this matter, the Fourth Circuit also followed or relied upon federal constitutional precedents and authority.[96] Accordingly, there was no jurisprudential authority for the Fourth Circuit to depart from existing federal and state constitutional jurisprudence in this matter and attempt to create an entirely new body of Louisiana constitutional law.

C. "Distinct Investment-Backed Expectations" Are Not Only Relevant, But Also Constitute a Critical and Requisite Consideration for Any Analysis of a "Takings" Claim.

In the majority opinion on rehearing, Judge McKay wrote that the, "'distinct investment-backed expectations' of Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), is *irrelevant* to the question of whether a "taking" has occurred under Louisiana law."[97] No authority, jurisprudential or otherwise, is cited for this pronouncement. Certainly no Louisiana Court prior to the Fourth Circuit's majority opinion has ever reached such a conclusion. In fact, as shown

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95 Id. at 392-393, citing Andrus, 444 U.S. at 66, 100 S.Ct. at 327.

96 State Department of Social Services v. City of New Orleans, supra, at *7, 154.

97 Exhibit "C," Majority Opinion at p. 9 (emphasis added).

above, at least one other Louisiana appellate court has considered reasonable or distinct "investment-backed expectations" to be relevant.[98]

A review of the jurisprudence from the other forty-nine States reveals that the highest courts of twenty-four (24) States explicitly consider or recognize the requirement of "reasonable investment-backed expectations" in a "takings" analysis.[99] The intermediate appellate Courts of Appeal in six other States, Arizona, Florida, Missouri, North Carolina, North Dakota and Wisconsin have also used the factor.[100] Significantly, DNR has been unable to locate any state court which has rejected consideration of "reasonable" or "distinct" "investment-backed expectations" in a "takings" analysis.

When the absence of such a finding is coupled with the authorities cited, supra, it becomes readily apparent that the Fourth Circuit's attempt to eliminate consideration of "investment-backed expectations" from a "takings" analysis represents not only a total departure from the established constitutional law of the United States Supreme Court, but

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98 Layne v. City of Mandeville, 93-0046 (La.App. 1st Cir. 12/29/93), 633 So.2d 608, 610, writ denied, 94-0268 (La. 3/25/94), 635 So.2d 234.

99 See footnote 4, supra.

100 **Arizona:** Laidlaw Waste Systems, Inc. v. City of Phoenix, 815 P.2d 932, 935 (Ariz.Ct.App. 1991); **Florida**: Golf Club of Plantation, Inc. v. City of Plantation, 717 So.2d 166, 170 (Fla. 4th DCA 1998); **Missouri**: Clay County, County Commission of Clay v. Harley and Susie Bogue, Inc., 988 S.W.2d 102, 107 (Mo.Ct.App. 1999); **North Carolina:** Sherrill v. Town of Wrightsville, 334 S.E.2d 357 (N.C.App. 1986); **North Dakota:** Southwest Cass Water Resource Dist. v. Burlington Northern R.R. Co., 527 N.W.2d 884, 894 - 895 (N.D. 1995); **Wisconsin**: Zealy v. City of Waukesha, 534 N.W.2d 917, 921 - 924 (Wis.Ct.App. 1995), rev'd on other grounds, 548 N.W.2d 528 (Wis. 1996).

also a departure from the jurisprudence of well over a majority (thirty) of the United States, as well as at least one lower appellate court of Louisiana. Accordingly, the Fourth Circuit's pronouncement comes without any authority whatsoever and should be overruled.

III. THE FOURTH CIRCUIT ERRED IN ELIMINATING ALL GOVERNMENTAL DEFENSES TO A TAKING SAVE FOR "BAD FAITH."

A. The Fourth Circuit's Opinion Renders All Louisiana Government Defenseless to "Takings" Claims.

Not unlike the recent tornado that swept through Houma, the Fourth Circuit's ruling has swept through the citadel of entrenched constitutional law, obliterating every known governmental defense and replacing them with a single heretofore unheard of defense in inverse condemnation, i.e., "bad faith." The Court has merged the distinct concepts of expropriation and inverse condemnation to conclude that, "the only bar (complete or partial) to compensation in either of these situations is bad faith."[101]

The Fourth Circuit's ruling cuts a wide swath through governmental defenses, eliminating such exceptions to governmental "takings" as the "government action requirement;" per se and total "takings" analyses; the "parcel as a whole" defense; considerations of temporary moratoria and prohibitions; forfeiture and fines; abatement of

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101 Exhibit "C," Majority Opinion at p. 9.

nuisances; emergency actions; the "bundle of rights" exception, and, categorical immunity.[102] In addition, the Fourth Circuit's ruling eliminates the navigable servitude defense,[103] the relative benefits doctrine[104] and the scope of wetland regulatory authority,[105] all of which were or should be available to any state governmental entity. All of these defenses vanish under the Fourth Circuit's ruling. Likewise, without any authority whatsoever, the Fourth Circuit has not only wiped out these defenses but also any consideration of "reasonable investment-backed expectations," a claimant's hurdle that has been critical to federal and state "takings" law analysis for decades.[106] The Fourth

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102 See, e.g., Sugameli, Lucas v. South Carolina Coastal Council: The Categorical and Other "Exceptions" to Liability For Fifth Amendment Takings of Private Property Far Outweigh the "Rule", 29 Envtl.L. 939, 944 - 958 (1999).

103 Avenal v. United States: Does the State of Louisiana Have a Property Interest in the Salinity of Its Waters?, 2 Ocean & Coastal L.J. 153, 160 - 163 (1996); Murphy v. Department of Natural Resources, 837 F.Supp. 1217, 1221 (S.D. Fla. 1993); Donnell v. United States, 834 F.Supp. 19, 26 (D. Me. 1993).

104 Hendler v. United States, 175 F.3d 1374, 1379 (Fed. Cir. 1999).

105 See, e.g., Dalazzola v. Coastal Resources Management Council, 1995 WL 941370 (R.I. S.Ct. 1/5/95) (appeal pending).

106 See, e.g., Forrest Properties, Inc. v. United States, 177 F.3d 1360, 1367 (Fed.Cir.), cert. denied, ___ U.S. ____, 120 S.Ct. 373 (1999) (rejecting an investment-backed expectations claim because the property was purchased in 1988, years after the Corps' wetland guidelines went into effect); Creppel v. United States, 41 F.3d 627, 632 (Fed.Cir. 1994) ("One who buys with knowledge of restraint assumes the risk of economic loss"); Brunelle v. Town of South Kingstown, 700 A.2d 1075, 1083 (R.I. 1997) ("(W)e do not believe that compensation is required for the simple reason that Brunelle, when he purchased the lot, did so with full knowledge [of the restrictions]"); Williams v. City of Central, 907 P.2d 701, 707 (Colo.Ct.App. 1995) ("If the landowner has

Circuit's action effectively reduces "takings" law in Louisiana to a system of automatic payments regardless of the merits of a "takings" claim, unless the governmental entity can prove "bad faith," i.e., fraud, a defense inexplicably somehow extracted from expropriation law.[107]

B. The Fourth Circuit's Action Renders Recovery on a "Takings" Theory Well-Nigh Automatic.

As this Honorable Court has recently observed, quoting several authorities:

> Governmental regulation - - by definition - - involves the adjustment of private rights for public benefit. To require compensation whenever the law curtailed the potential for economic exploitation 'would effectively compel the government to regulate by purchase.'[108] As a result, economic restraints do not rise to the level of a taking because, in

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(footnote 106 continued)
notice [at the time of purchase] of the extent of the government's regulatory authority over the property, the landowner's reasonable investment-backed expectations is the dispositive factor in the takings analysis."); Buechel v. Department of Ecology, 884 P.2d 910, 918 - 919 (Wash.Ct.App. 1994) (finding that the landowner could not claim that State Shoreline Management Act diminished the value of his property as he had acquired it after the Act was enacted).

107 State Department of Highways v. Vermillion Development Co., 249 So.2d 161, 171 (La. 1971).

108 Lawrence H. Tribe, American Constitutional Law, 596-97 (2dEd. 1988) (quoting Andrus v. Allard, 444 U.S. 51, 65, 100 S.Ct. 318, 326, 62 L.Ed.2d 210 (1979) (emphasis in original)).

> the off-quoted words of former Justice Holmes, '(g)overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'[109]

The Fourth Circuit's action flies in the face of this sound reasoning. Specifically, the Fourth Circuit's ruling eliminates all known governmental defenses and replaces them with a single defense of "bad faith," i.e., fraud, which has never been considered a defense in inverse condemnation by any state or federal court in Louisiana. DNR is unaware of any other court which has limited government entities to such a defense or even considered such a defense. If the Fourth Circuit's ruling is allow to stand, Louisiana government at every level, State, Parish or local, will be subjected to takings claims for which there will be no defenses other than fraud, bringing government at every level to a halt. This means that governmental officials will have to prove fraud against their own constituents and electorate or, alternatively, pay any claim presented to them.

C. To Reach Its Result, The Fourth Circuit Inexplicably Merged the Distinct Concepts of Expropriation and Inverse Condemnation.

The term "inverse condemnation" is neither synonymous nor interchangeable with "expropriation." Yet the

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109 Louisiana Seafood Management Council v. Louisiana Wildlife & Fisheries Commission, 97-1367 (La. 5/19/98), *8-9, 715 So.2d 387, 392, citing, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922).

Fourth Circuit has incorrectly treated the two as one concept to conclude that the only defense to a "taking" is that available under expropriation, i.e., bad faith. As will be shown below, the two concepts are separate and distinct legal constructs under Louisiana law.

1. Expropriation

The power of ***expropriation*** or eminent domain is the right of the state or its subdivisions to take private property for public purposes, which is inherent in the police power of the state.[111] The Louisiana ***expropriation*** laws are a creature of statutory law and provide in detail how the expropriation proceedings must take place.[112] For example, La. R.S. 19:2.2 provides that before exercising its rights of expropriation, the state or its political subdivisions must provide the owner with certain information from its appraisal as to the amount of compensation due. The required information includes the name, address, and qualifications of the appraisers, the amount of the appraisals, and a description of the methodology used in the appraisal. Additionally, the state must offer to compensate the owner in an amount equal to at least the lowest appraisal.[113] Obviously, the major difference between expropriation and inverse condemnation is that the government intends to take property and institutes expropriation proceedings toward that end. In contrast, with inverse condemnation, it is unclear whether property has been taken. Therefore, the Claimant must prove the property has been taken or damaged and the government should be allowed to disprove

111 Hobgood v. Parish of East Baton Rouge, 563 So.2d 413 (La. App. 1st Cir. 1990), writ denied, 567 So.2d 105.

112 La. R.S. 19:1, et seq.

113 See, Board Of Commissioners, 625 So.2d at 1073 - 1074.

such a claim. An analogy can be made to the difference between stipulated liability in tort and an injured Plaintiff's burden of proof when liability in tort is contested.

The "bad faith" defense can arise when an ***expropriation*** proceeding has been undertaken by the State. Plaintiffs have repeatedly acknowledged that this is not an ***expropriation*** case, but an inverse condemnation case. In ***expropriation***, the State acknowledges that the property is being taken for a public purpose and only "bad faith" will justify a denial of, or reduction in, recovery. In contrast, an inverse condemnation action requires the Plaintiff to show that his property interest has been taken in a constitutional sense and all aspects of his property interest or economic expectations are placed directly at issue. Thus the Plaintiffs' prior knowledge or notice of the proposed government action is relevant to whether a "taking" actually occurred. Accordingly, the ***expropriation*** cases relied upon by the Plaintiffs in proceedings below completely contradict their self-described inverse condemnation suit against DNR. A careful review of inverse condemnation cases under Louisiana law reveals this important distinction.

2. Inverse Condemnation

The legal standard used in determining an action for inverse condemnation differs sharply from that used in a statutory ***expropriation*** proceeding. This Court has recognized the action for inverse condemnation arises out of the self-executing nature of the constitutional command to pay

ust compensation.[114] The action for inverse condemnation provides a procedural remedy to a property owner seeking compensation for land allegedly taken or damaged in a constitutional sense against a governmental or private entity having the powers of eminent domain where no expropriation has commenced.[115] Where no ***expropriation*** has taken place, Plaintiffs must prove that a "taking" has occurred. They must therefore prove the elements of a taking and overcome the defenses thereto. Plaintiffs have never cited and DNR has never found a case in which a Louisiana Court has applied the statutory law of ***expropriation*** in an inverse condemnation suit, or the law of inverse condemnation to a statutory expropriation proceeding. To do so would directly violate this Honorable Court's recognition of the clear distinction between the two concepts.[116] The Fourth Circuit's original opinion recognized the unique characteristics of each proceeding, and correctly applied the law of inverse condemnation to Plaintiffs' inverse condemnation suit. The Fourth Circuit's final opinion on rehearing did not, and should therefore be reversed.

CONCLUSION

The Fourth Circuit's 3-2 decision has obliterated decades of constitutional law in one fell swoop. Worse still,

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114 State, Through Dept. of Transportation and Development v. Chambers Investment Co., Inc., 595 So.2d 598, 602 (La. 1992). See also Ardoin v. State, through Dept. Of Transportation and Development, 679 So.2d 928 (La. App. 3rd Cir. 1996).

115 Id. at 602.

116 State through Department of Transportation and Development v. Chambers, 91-1202 (La. 3/2/92), 595 So.2d 598, 602.

the Fourth Circuit was unable to cite any controlling authority to support its action. This was because all controlling authority actually runs contrary to every aspect of the Fourth Circuit's ruling.

DNR submits that this Honorable Court should restore the legal landscape to what it was prior to the Fourth Circuit's devastating decision. This will, in turn, allow all levels of Louisiana government to remain functional rather than be forced "to regulate by purchase." DNR will also be able to return to the difficult task of restoring one of Louisiana's most valuable economic resources, its wetlands and coastal areas.

The decision of the Fourth Circuit should be reversed and judgment should be rendered in favor of DNR, dismissing all claims just as in the parallel federal proceedings. Pending this Honorable Court's decision, given the far-reaching impacts of the Fourth Circuit's decision on all aspects of government, DNR respectfully requests a stay of proceedings and expedited consideration.

RESPECTFULLY SUBMITTED,

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